

Factual Record
Ontario Logging Submission
(SEM-02-001)
&
Ontario Logging II Submission
(SEM-04-006)

**Prepared in Accordance with Article 15
of the North American Agreement
on Environmental Cooperation**

June 2006

For more information about this or other publications from the CEC,
contact:

Commission for Environmental Cooperation of North America
393, rue St-Jacques Ouest, bureau 200
Montréal (Québec) Canada H2Y 1N9
Tel.: (514) 350-4300
Fax: (514) 350-4314
E-mail: info@cec.org

<http://www.cec.org>

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PROFILE

In North America, we share a rich environmental heritage that includes air, oceans and rivers, mountains and forests. Together, these elements form the basis of a complex network of ecosystems that sustains our livelihoods and well-being. If these ecosystems are to continue to be a source of life and prosperity, they must be protected. Doing so is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation of North America (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts, and promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of 15 citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

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The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

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1. Executive summary

Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (“NAAEC”) establish a process allowing residents of Canada, Mexico and the United States to file submissions alleging that a Party to the NAAEC (Canada, Mexico or the United States) is failing to effectively enforce its environmental law. Under the NAAEC, this process can lead to the publication of a factual record. The Secretariat (“Secretariat”) of the North American Commission for Environmental Cooperation (“CEC”) administers the NAAEC citizen submissions process.

On 6 February 2002, Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (United States), Sierra Club of Canada, and Wildlands League (together, the “Submitters”), represented by Sierra Legal Defence Fund, filed with the Secretariat a submission alleging that Canada is failing to effectively enforce federal migratory bird conservation legislation in connection with logging operations in Ontario. In March 2004 and April 2005, respectively, pursuant to Council Resolutions 04-03 and 05-04, the CEC Council instructed the Secretariat to prepare a factual record with respect to the alleged failure by Canada to effectively enforce s. 6(a) of the *Migratory Birds Regulations* (“MBR”) adopted under the *Migratory Bird Convention Act, 1994* in regard to clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in fifty-three (53) forest management units located in central and northern Ontario. S. 6(a) of the MBR makes it an offence, among other things, to disturb, destroy or take a nest of a migratory bird without a permit. Under the MBR, permits may only be issued for limited purposes such as scientific research.

Article 5 of the NAAEC requires Canada, as a Party to the Agreement, to effectively enforce its environmental laws and regulations through appropriate government action, and it lists examples such as appointing and training inspectors; monitoring compliance and investigating suspected violations, including through on-site inspections; seeking assurances of voluntary compliance and compliance agree-

ments; and promoting environmental audits. In developing the factual record, the Secretariat asked Canada for information regarding whether it has taken any of the enforcement actions listed in the NAAEC to enforce s. 6(a) of the MBR in connection with logging activities under review by the Secretariat. The Secretariat received no information from Canada indicating that it has taken any such actions. Environment Canada provided the Secretariat with information on workshops held by the Canadian Wildlife Service (“CWS”) to promote compliance with s. 6(a) of the MBR.

Canada stated that it is focusing enforcement efforts on species of conservation priority. The Secretariat inquired whether information is available to determine conservation needs for migratory birds nesting in the area of Ontario covered by the factual record, an area of roughly forty (40) million hectares. Decades-long volunteer efforts have provided valuable population monitoring data, but reliance on road-side bird counts has left information gaps on trends for forest interior bird species and remote forest areas. Federal government scientists are recommending to management that the CWS establish and lead a national landbird monitoring program to fill these and other data gaps. As regards setting conservation priorities, Canada has not yet decided whether downward population trends for severely declining species that are still relatively widespread and common should be a trigger for conservation action. Canada is beginning to consider threats to migratory bird populations in setting regional priorities as part of a voluntary, multistakeholder, monitoring and conservation initiative. Canada stated that “the availability of information demonstrating a connection between logging and a downward trend in migratory bird populations is not determinative of whether or not an enforcement action will be taken,” although it added that such information would be considered in determining how to respond to a violation.

Canada stated that it considers complaints from the public in deciding where to focus enforcement efforts, and it cited an e-mail sent to CWS by a member of the public in July 2001. The complainant sent CWS two letters and an e-mail concerning a logging operation scheduled to be carried out in Ontario during the migratory bird nesting season under a contingency forest management plan. CWS did not take any enforcement action in response to the complaint. Canada reported that staff from Ontario’s Ministry of Natural Resources (“MNR”) later told CWS that logging under the plan was over, and CWS therefore decided that no action by CWS was required. The Secretariat gathered information on the role of complaints within the CWS framework for enforcing s. 6(a) of the MBR. It found no information on the CWS website regarding

how and where to file complaints and explaining the complaints process. The province of Ontario has a system allowing residents of the province to request investigations into violations of environmental laws, but s. 6(a) of the MBR is not included in the list of federal laws for which an investigation can be requested. Ontario's forestry legislation does not contain whistleblower protection for forestry workers who report violations of environmental laws under the province's forestry self-inspection system. Ontario's wildlife legislation contains a provision prohibiting destruction of bird nests not covered by the MBR, but MNR has issued program direction stating that the provision is not intended to change Ontario's approach to ongoing activities such as forest harvesting.

Canada stated that in Ontario, logging licenses require forest products companies to protect the environment, and it noted that CWS is aware that Ontario's forestry guidelines contain biodiversity components. The Secretariat gathered factual information on whether and how Ontario's forest management system assured protection of migratory bird nests during logging identified by the Submitters. These facts are relevant to considering information available to Canada for enforcing s. 6(a) of the MBR in the factual context identified by the Submitters. Ontario's forestry system requires protection of known raptor and great blue heron nests during logging. The needs of other birds are meant to be addressed by maintaining a range of habitat types and characteristics on the landscape, within the "bounds of natural variation." In this system, "habitat" refers to tree species and age classes and associated features such as snags.

Ontario has published forest management planning guidelines for several migratory bird species. These guidelines caution that "[m]anagers may be tempted to shorten rotation times for forest cutting in an attempt to provide only the minimum standards for the maintenance of the most critically threatened wildlife species. In the long run, this may bring about a biological disaster." For the purpose of considering migratory bird habitat needs during the preparation of forest management plans in Ontario, a computer model designed to manage wood supply – to plan regeneration efforts to keep pace with logging – has been fitted with a "habitat matrix" that describes the effect of different "management alternatives" (logging scenarios) on habitat availability for a range of species over long time frames. MNR has advised foresters that a management alternative will be considered sustainable if habitat for indicator species – such as selected species of migratory birds – does not fall more than twenty (20) percent below the lowest amount expected to be present on the landscape under natural conditions (i.e. assuming no human intervention, and taking into account natural forces such as wildfires).

The Secretariat reviewed the fifty-three (53) forest management plans covered by the factual record. Some plans were developed before the habitat matrix was available or contained obvious errors in habitat calculations. For the thirty-eight (38) remaining plans, the Secretariat reviewed habitat projections for birds covered by the MBR. For nine (9) of the ten (10) species of birds covered by the MBR that were used as indicator species during forest management planning, forest management alternatives selected by forestry companies and approved by MNR were projected to create a “desired future forest condition” with a smaller future amount of preferred habitat for those species. The total projected habitat decrease under the thirty-eight (38) forest management plans, taken together, ranges from 8% for Blackburnian Warbler to 35% for Pileated Woodpecker. Pileated Woodpecker is a “featured species” in Ontario’s forest management planning system. Addressing the habitat needs of the Pileated Woodpecker is meant to simultaneously address the habitat needs of many other species that rely on mature and old growth forests.

It is Ontario policy to ensure that no species declines on a provincial scale because of logging. Ontario has adopted no provincial or regional population or habitat objectives for migratory birds, and it does not track, at a provincial scale, migratory bird habitat trends associated with implementing forest management plans. When Ontario’s Ministry of the Environment released for comment new provincial rules for protecting the environment during logging, it did not follow Environment Canada’s recommendations for addressing migratory bird conservation, and MNR has not granted Environment Canada’s requests to be represented on provincial forest advisory committees. Environment Canada has stated that adequate obligations do not exist under provincial rules to require MNR to protect Environment Canada’s interests in forest management activities in Ontario, including its interest in the conservation and protection of migratory birds.

In a paper presented at a CWS multistakeholder compliance promotion workshop in 2001, an advisor to the Canadian Forest Products Association stated that CWS does not have the resources to strictly enforce s. 6(a) of the MBR, and that the preferred option would be for CWS to adopt an enforcement policy exempting forestry from enforcement on the condition of complying with provincial forest management rules containing measures to address migratory bird conservation. The paper concludes that any solution should avoid the use of federal permits because this would create another layer of red tape and open forest management to the federal environmental assessment process.

2. Summary of the submission

Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (United States), Sierra Club of Canada, and Wildlands League (together, the Submitters), represented by Sierra Legal Defence Fund, assert that Canada is failing to effectively enforce s. 6(a) of the *Migratory Birds Regulations* (“MBR”)¹ adopted under the *Migratory Birds Convention Act, 1994* (“MBCA”)² in regard to the logging industry in Ontario. S. 6(a) of the MBR provides that “[...] no person shall (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird [...] except under authority of a permit therefor.” Violations of s. 6(a) of the MBR may be prosecuted by way of summary conviction or as an indictable offence.³ The Submitters allege that Environment Canada (“EC”), through its Canadian Wildlife Service (“CWS”), is primarily responsible for enforcing the MBCA.⁴

The Submitters claim that their research, based on statistical data, estimates that in the year 2001, clear-cutting activity destroyed over 85,000 migratory bird nests in areas of central and northern Ontario.⁵ The Submitters further assert that “despite the estimated widespread destruction of bird nests,”⁶ an access-to-information request filed in 2001 revealed no investigations or charges in Ontario for violations of s. 6(a) of the MBR.⁷

1. C.R.C., c. 1035.

2. S.C. 1994, c. 22.

3. In regard to any violations of the MBCA that occurred in 2001, s. 13 of the MBCA provides that for a summary conviction offence, a company faces a maximum fine of \$100,000, an individual a maximum \$50,000 fine. Individuals are also liable to jail terms of up to six months, or a combination of jail and a fine. For indictable offences, the maximum fines are \$250,000 for a company and \$100,000 for an individual. Individuals are also liable to jail terms of up to five years, or to both a fine and jail sentence. With subsequent offences the maximum fine to which an individual is liable is doubled. (The Act was amended in 2005 to raise the maximum fine, on summary conviction, to \$300,000. The terms “individual” and “corporation” were replaced by the single term “person”. On indictment, the maximum fine was increased to \$1,000,000 and the jail term lowered to a maximum of three years. S.C. 2005, c. 23, s. 9).

4. Submission at 3.

5. Submission at 4 and Appendix 6 of the Submission: Dr. Elaine MacDonald & Kim Mandzy, *Migratory Bird Nest Destruction in Ontario* (Toronto: Sierra Legal Defence Fund (SLDF), 2001).

6. Submission at 1.

7. Submission at 6 and Appendices 7 and 8 of the submission (access to information request respecting enforcement efforts under s. 6(a) of the MBR dated 13 July 2001 from Elaine MacDonald, SLDF to Michael Bagues, Chief Access to Information and Privacy Secretary, Environment Canada, and materials received in response to access to information request).

The Submitters assert that logging activity in Ontario is carried out under forest management plans (“FMPs”) prepared under the supervision of the Ontario Ministry of Natural Resources (“MNR”) in accordance with provincial standards and without any input from federal authorities on matters related to enforcing the MBCA, which is a federal statute.⁸ They assert that while EC can be contacted for input on FMPs and has produced a non-binding guideline⁹ directing that activities be avoided during critical periods of migratory birds’ lifecycles, “EC fails to take enforcement activities to ensure that this requirement [...] is adhered to.”¹⁰

According to the Submitters, the CWS considers nest destruction during logging to be “incidental” kill and the CWS has decided not to use proactive enforcement measures against the logging industry because violations of s. 6(a) of the MBR that occur during logging operations are not intentional.¹¹ The Submitters claim that the MBCA does not distinguish between intentional and unintentional violations, and that like other public welfare laws, when it is infringed, it is often the result of unintentional, not wilful, conduct.¹²

The Submitters allege that the CWS favours conservation initiatives over enforcement in regard to the logging industry even though it lacks evidence that this approach is more effective. Further, they contend that even though logging has been an important industry in Canada and Ontario for many decades, when the MBCA was updated in 1994, the Canadian government did not exempt the logging industry from laws to protect migratory birds or their nests.

Finally, the Submitters assert that by giving the logging industry special consideration, Canada is not following the requirement of the Compliance and Enforcement Policy for Wildlife Legislation, which states that “[c]ompliance and enforcement activities must be securely founded in law and must be fair, predictable, and consistent across Canada.”¹³ They also argue that “prosecutorial discretion” must be exercised on a case-by-case basis and cannot support a decision not to engage in prosecutions on an industry-wide basis.¹⁴

8. Submission at 5.

9. *Environmental Assessment Guideline for Forest Habitat of Migratory Birds*.

10. Submission at 5, note 32.

11. Submission at 8.

12. *Ibid.*

13. Submission at 11.

14. *Ibid.* at 10.

The Submitters claim that a reasonable exercise of enforcement discretion would require an environmental assessment of a proposed FMP or logging operation in order to weigh the relative costs associated with each option, something which, they claim, has not been done. They also advance several arguments in support of their view that the cost of enforcing section 6(a) of the MBR need not have a significant impact on EC's enforcement budget.¹⁵

On 20 August 2003, pursuant to Council Resolution 03-05 (see s. 4, below), the Secretariat received from the Submitters a document entitled "Supplementary Submission to the Commission for Environmental Cooperation in Response to Council Resolution 03-05 dated April 22, 2003" (the "Supplementary Submission").

In the Supplementary Submission, the Submitters state that they interpret Council Resolution 03-05 "as an attempt to scope our request for a factual record in a manner that goes beyond the Council's mandate under the NAAEC."¹⁶ They add "[n]onetheless, in an effort to avoid any further delay in the preparation of a factual record, we have obtained all additional 'facts' and the 'sufficient information' currently available to respond to the Council Resolution."¹⁷

The Submitters explain that when they drafted their submission, they based their calculations on projected figures for clearcut harvest areas contained in FMPs rather than actual numbers, because those numbers were not available when the submission was filed, in February of 2002.¹⁸ They note that in its Article 15(1) Notification, the Secretariat stated "[t]he only information missing is a more precise identification of the areas actually harvested in those forests in 2001" and that such information "[...] could readily be developed in a factual record."¹⁹

Section II of the Supplementary Submission, entitled "The Supplementary Evidence," describes the process engaged by the Submitters to gather additional information in response to Council Resolution 03-05, and the information obtained.

The Submitters contacted MNR for information regarding areas actually harvested in 2001. They were told that the information they were seeking is reported annually to MNR by logging companies for

15. *Ibid.*

16. Supplementary Submission at 3.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.* and note 6, referencing the Article 15(1) Notification at 10.

each FMU, in a report table titled Annual Report of Depletion Area.²⁰ Reports are prepared on a fiscal year basis (1 April-31 March), and they are due by 15 November following fiscal year end.²¹ Once submitted, they are reviewed by MNR, which provides comments.²² Finalization of the reports can take several months.²³ When the Submitters contacted MNR in May 2003, only fifteen (15) of the fifty-nine (59) FMUs referenced in the submission had completed reports for the fiscal year beginning 1 April 2001.²⁴

MNR provided the Submitters with a list of MNR telephone numbers to allow them to gather information concerning harvest data for the forty-four (44) FMUs whose reports were not yet complete.²⁵ According to the Submitters, this proved fruitful in some cases and additional data was obtained.²⁶ In others, the information could not be released by MNR because the annual reports had not yet been finalized and approved by district managers.²⁷ As a last resort, the Submitters contacted FMP authors directly.²⁸ They report that in many cases, FMP authors were forthcoming with information and actual harvest data was obtained for forty-nine (49) of the fifty-nine (59) FMUs included in the original submission.²⁹ The Submitters explain that “[o]f the remaining 10 units, five had been amalgamated with other units, one logging license had been revoked, and clearcut harvest data was not yet available from any of the sources we contacted for four units.”³⁰ The Supplementary Submission provides detailed information regarding attempts made by the Submitters to obtain information regarding the remaining four (4) units.³¹

The Supplementary Submission contains a table listing the fifty-nine (59) FMUs referenced in the original submission.³² For forty-nine (49) FMUs, it provides information on the planned clearcut area (drawn from the FMPs used to prepare the original submission) and on the actual clearcut area (drawn from annual reports and telephone interviews referenced in the Supplementary Submission).³³ For each of these

20. *Ibid.* at 4 and note 7.

21. *Ibid.* at 4.

22. *Ibid.*

23. *Ibid.*

24. *Ibid.* at 5 and note 10.

25. *Ibid.* at 5.

26. *Ibid.*

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*

30. *Ibid.*

31. *Ibid.* at 6, note 13.

32. *Ibid.* Table 1. “Comparison of Planned and Actual Clearcut Areas for 2001-02.”

33. *Ibid.*

FMUs, the table also lists the source of the information.³⁴ The Submitters remark that information they gathered regarding the number of hectares clearcut in fiscal year 2001-2002 indicates that numbers were lower than projected.³⁵ They explain that this is due in part to the absence of data regarding four (4) FMUs.³⁶ They add that since FMPs contain projected harvest information for five-year periods, the original submission simply divided those figures by five to obtain a one-year estimate.³⁷ The Submitters explain that the rate of cutting varies over the course of a five-year period for various reasons, including weather conditions, contractor availability and First Nations issues, and they add that when asked about the variations, MNR consistently replied that while rate of harvesting may vary from year to year, it typically balances out after five (5) years.³⁸

The Supplementary Submission then addresses whether clearcut logging occurred during the migratory bird nesting season.³⁹ The Submitters begin by remarking that MNR does not collect harvest data on a monthly basis.⁴⁰ They explain that in order to determine whether and how much logging may have taken place during the migratory bird nesting season, they relied on lumber scaling data obtained from MNR.⁴¹ They assert that this data can be used as an indicator of the rate of logging on a monthly basis throughout the year.⁴² The Submitters report that the 2001-2002 scaling data shows that more logging occurred during the winter months than the summer and spring months.⁴³ They add that the nesting period occurs predominantly between April and August and lasts one month, starting when nest construction begins and ending once the brood has fledged.⁴⁴ The Submitters totalled the percentage of the annual harvest scaled from April to August 2001 and determined that approximately 27% of annual harvest occurred during that period.⁴⁵ By then prorating for one month to coincide with the average length of nesting, they estimated that on average 5.3% of the annual harvest occurred during nesting.⁴⁶ Using the breeding bird density data gathered for the original

34. *Ibid.*

35. *Ibid.* at 8.

36. *Ibid.*

37. *Ibid.*

38. *Ibid.*

39. *Ibid.* at 9.

40. *Ibid.*

41. *Ibid.*

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. *Ibid.*

submission, the Submitters calculated the number of nests destroyed by multiplying the discounted breeding bird density per hectare by the number of hectares clearcut in 2001-2002 multiplied by a factor of 0.0536 to account for the seasonal variation in the logging rate and a nesting period of one month.⁴⁷ Based on this calculation, the Submitters estimated at approximately 43,700 the total number of nests destroyed in the forty-nine (49) FMUs.⁴⁸

In sections III and IV of the Supplementary Submission, entitled “The nature of the evidence that can reasonably be expected from a citizen group” and “The Problem with Scoping,” the Submitters assert that their submission sets out evidence about a wide-scale failure of the Government of Canada to effectively enforce s. 6(a) of the MBR and they state that they have asked that a factual record be prepared for each of the FMUs in which clearcutting takes place.⁴⁹ They maintain that statistical or modeling information is appropriate where it is the best information that is reasonably available to a citizen’s group.⁵⁰ They state that the object of the NAAEC citizen submissions process is not to meet the standard of proof applicable in legal proceedings, but rather to provide sufficient information to allow the Secretariat to review the allegation of non-enforcement.⁵¹ They contend that there is little merit in investigating specific instances when, as they allege, all of the evidence, particularly government records, points to both a widespread problem of nest destruction and a widespread failure to enforce the law.⁵²

On 12 October 2004, the Submitters filed with the Secretariat submission SEM-04-006 (Ontario Logging II) (“Ontario Logging II”), containing additional information regarding the four FMUs that were excluded from the scope of the factual record for Ontario Logging by Council Resolution 04-03 (Cochrane, Shiningtree, Temagami and Wawa, hereinafter “the four FMUs”) (see below, s. 4). In Ontario Logging II, the Submitters estimate that 1,270 migratory bird nests were destroyed during logging in 2001 in the four FMUs.

3. Summary of Canada’s Response

In its Response dated 11 April 2002, Canada advises that the Submitters did not adequately inform the Secretariat of remedies, such as

47. *Ibid.* at 10.

48. *Ibid.*

49. *Ibid.* at 12.

50. *Ibid.* at 12-13.

51. *Ibid.* at 13.

52. *Ibid.* at 15.

complaints to CWS, which were available to them.⁵³ Canada asserts that prior to the filing of the submission, it received only one written complaint of nest destruction pursuant to logging in Ontario, and this complaint, which was duly investigated, was not filed by one of the Submitters.⁵⁴ Canada notes that the Submitters sent only two written communications to relevant authorities before filing the submission and that CWS officials replied to these communications, committing to pass along further information as it became available.

Canada points out that CWS staff had been trying to set up a meeting with several of the Submitters as well as other interested nongovernmental organizations long before the filing of the submission. The purpose of the meeting would have been to allow the CWS to explain the legal basis of the MCBA regulations; the overall approach to the conservation of migratory birds, including enforcement; and the foundations of the current policy on enforcement of the regulations. The CWS would also have sought input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. Canada asserts that the Submitters delayed scheduling a meeting with the CWS until after the filing of the submission, and expresses concern that the decision to do so "is not reflective of the letter and spirit of the NAAEC."⁵⁵ According to Canada, at least one Submitter, the Canadian Nature Federation, did participate in a workshop on migratory bird issues, including enforcement of the MBR, on 12-13 October 2001.

Canada asserts that the Submitters' assertions are not based on any actual case where a failure to effectively enforce the MBR may or may not be occurring, and that as a result, the Canadian Government is precluded from addressing in a direct and factual manner the assertions made by the Submitters.⁵⁶

Despite these reservations, Canada provided a response to the submission. In the Response, Canada states that EC and its agency, the CWS, are responsible for the conservation and protection of migratory birds in Canada.⁵⁷ It notes that CWS programs address migratory bird conservation on several fronts, including law enforcement, habitat stewardship, scientific research and other conservation actions. Canada states that

53. Government of Canada, "Response to Submission SEM-02-001" (11 April 2002) [hereinafter the "Response"].

54. *Ibid.* at 1.

55. *Ibid.* at 2.

56. *Ibid.*

57. *Ibid.* at 4.

annual priorities for wildlife enforcement respond to public complaints, international commitments, and wildlife conservation goals, and reflect a balancing of public concern, conservation science, and international commitments. It remarks that given that resources and staff are limited, and that enforcement of the MBR must take place over a very large geographical range, some components of the migratory bird conservation program, including the range of enforcement options, will necessarily receive more attention than others. Canada states that enforcement activities aim both to proactively address key conservation goals, as defined by the CWS, and to respond to public concerns and emerging conservation issues.

Canada states that the CWS must work cooperatively “with other federal departments and agencies, provincial and territorial governments, as well as industry, NGOs, and the research community, to make choices that promote a healthy landscape in an increasingly complex environment.”⁵⁸

Canada states that forestry legislation and guidelines in Ontario provide for protection of the environment, including biodiversity, and that federal agencies are invited to public consultations to provide input in the development of FMPs. Canada disputes the Submitters’ apparent view that a proposed FMP can routinely trigger the federal environmental assessment process under the *Canadian Environmental Assessment Act*. Canada states that approval of a provincial FMP does not absolve companies of their responsibilities under the federal MBCA.

Canada denies the Submitters’ assertion that it has a sweeping policy not to enforce the MBR against the logging industry.⁵⁹ The Response states that in regard to wildlife law enforcement, Canada traditionally targets hunting, and, in recent years, illegal import and export of wildlife and derivatives. Current enforcement priorities at the national level include commercial smuggling and migratory bird protection, primarily off- and near-shore spills that result in oiled birds. Canada notes that the regional offices of EC establish a subset of these priorities so that the Department can obtain the most effective coverage possible with the resources available.

Canada contends that it is addressing the issue of nest destruction during logging activities, mainly through compliance promotion.⁶⁰ In January 2001, the CWS met with industry representatives and told them

58. *Ibid.*

59. *Ibid.* at 7.

60. *Ibid.*

that the taking of migratory bird nests is prohibited except under the authority of a permit and that compliance with s. 6(a) of the MBR is mandatory. In October 2001, the CWS held a workshop on the topic of compliance with the MBCA and associated regulations and conservation of migratory birds in the forestry context that was attended by industry groups, Canadian Nature Federation, government representatives and specialists.

Canada states that compliance promotion and education are a necessary first step in a long-term enforcement approach in the forestry context that will eventually facilitate arguments in court that a given logging company will have been aware of the impacts of its actions. Canada "is concerned that obtaining limited results in a court of law for non-compliance at this stage would devalue the offence, and would be counterproductive to conservation of migratory birds."⁶¹ Canada states that EC is nevertheless committed to acting on any instances of non-compliance that it becomes aware of and to pursuing the most effective remedy possible, including prosecutions where appropriate.

Canada asserts that the CWS is planning and in the process of implementing significant new initiatives and programs to address the growing needs of compliance promotion and enforcement of wildlife laws among industry in general.⁶²

In conclusion, Canada asserts that because the Submitters failed to provide any actual case, and because of their failure to otherwise make a complaint to the CWS that a logging operation in Ontario was in violation of s. 6(a) of the MBR, the Government of Canada believes that a factual record is not warranted.

Canada's Response to Supplemental Information, filed with the Secretariat on 16 October 2003, contains comments on the additional information provided by the Submitters pursuant to Council Resolution 03-05 as well as a description of the CWS approach to bird nest conservation and some observations concerning enforcement activities within the 49 FMUs for which the Submitters presented additional information in the Supplementary Submission (see s. 4, below).⁶³

Canada remarks that unlike the original submission, the Supplementary Submission asserts, rather than hypothesizes, that harvesting

61. *Ibid.* at 8.

62. *Ibid.* at 9.

63. Government of Canada, "Response to Supplemental Information" (16 October 2003) [hereinafter the "Response to Supplemental Information"] at 3.

took place during the migratory bird nesting season, by relying on actual harvest data and the application of a method for determining how much logging took place during each month of the year.⁶⁴ Canada states that the Submitters have found that actual harvesting during the migratory bird nesting season was far less than hypothesized in the original submission.⁶⁵ It remarks that in the Supplementary Submission, the Submitters did not reveal any complaints in addition to the one identified by the CWS in Canada's Response to the original submission.⁶⁶

Regarding the Submitters' calculations, Canada notes that

[t]o arrive at an estimate of the number of nests potentially destroyed as a result of the logging that likely took place during the nesting season, the submitters continue to use the same simple method that was used in the original submission.⁶⁷

According to Canada, in quantifying the density of sixteen selected breeding birds using data from the Canadian Breeding Bird (Mapping) Census Database, the Submitters did not take into consideration important variability displayed in the breeding density of those species and the possibility of stratifying the data.⁶⁸ Canada asserts that for this reason, the Submitters' estimate of the number of nests potentially destroyed as a result of logging during the migratory bird nesting season remains very imprecise.⁶⁹ Canada asserts that "[t]he NAAEC Article 14/15 submission process should be grounded in specific instances of alleged failures to effectively enforce a Party's environmental law."⁷⁰ It remarks that although the Submitters' estimate "is still based on extrapolations from a simple model, rather than on evidence of specific bird nests having been destroyed by specific logging operations, the supplemental information does provide some specific information."⁷¹ Canada states that given the particular circumstances of this submission, the supplemental information now provides sufficient information to enable the Government of Canada to provide a meaningful response.⁷²

Canada then describes the CWS approach to bird nest conservation, stating

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. *Ibid.*

68. *Ibid.*

69. *Ibid.*

70. *Ibid.* at 4.

71. *Ibid.*

72. *Ibid.*

CWS continues, in addition to inspections, investigations and prosecution, to utilize education, compliance promotion, regulation development and public reporting, as means to achieve bird conservation.⁷³

Canada recalls that no permitting system has been created pursuant to s. 6(a) of the MBR “[...] to recognize circumstances where industry has taken considerable measures that will benefit the conservation of migratory birds, for example through the preparation and implementation of conservation plans.”⁷⁴ Canada observes that “[t]his has created legal uncertainty for the Forestry industry because even after they have implemented conservation plans that would benefit migratory bird populations, they would still be at risk for prosecution should any small limited incidental take of nests occur during the course of their activities.”⁷⁵ Canada explains that as a result, CWS has been involved in a joint effort with industry and nongovernmental organizations to develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity.⁷⁶

Canada's Response to Supplemental Information refers to workshops held in October 2001, February 2002, and March 2003, in which Environment Canada staff met with the Forest Products Association of Canada, some nongovernmental organizations, and other stakeholders.⁷⁷ According to Canada, the first workshop affirmed the significance of the forest environment for the conservation of a large number of migratory bird species and the difficult compliance issues faced by industry.⁷⁸ In the second workshop, CWS explained that its approach on regulations and enforcement has two main objectives: to ensure the sustainability of migratory birds, and to ensure that CWS officials, as agents of the Minister of Environment, fulfill their legal responsibilities.⁷⁹ CWS organized the meeting to obtain input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations.⁸⁰ At the third meeting, also attended by representatives of the natural resources departments of Ontario, British Columbia, New Brunswick and Alberta, the focus was on discussing conservation and compliance issues with the MBR.⁸¹ Canada reports that the outcome of the workshop was a gen-

73. *Ibid.*

74. *Ibid.*

75. *Ibid.*

76. *Ibid.*

77. *Ibid.* at 5.

78. *Ibid.*

79. *Ibid.*

80. *Ibid.*

81. *Ibid.*

eral agreement by participants on a draft framework to deal with migratory bird conservation within the forestry context.⁸² A working group was tasked with further developing the framework, with recommendations to be made by the end of December 2003.⁸³ Canada anticipates that regulatory changes may be required to allow for an approval system to deal with the destruction of nests that may result from industrial operations.⁸⁴

Canada explains that the CWS wants to focus its efforts on species of conservation priority and continue to work collaboratively with stakeholders to sustain viable populations of migratory birds within the forests of Canada.⁸⁵ Canada's response notes that "[n]o federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered."⁸⁶ Canada adds that "[g]iven the nature of the submission, which references areas in boreal forest to a large extent, it follows that the Submitters have not established a case that any threatened or endangered species were involved."⁸⁷ Canada notes that a major project running until 2006 has been undertaken to compile additional information on migratory birds in the boreal forests of Ontario to assist Environment Canada in determining locations and trends of migratory birds in Ontario and provide a baseline for monitoring species populations and habitat change.⁸⁸

Regarding enforcement activities in the 49 FMUs for which additional information was provided in the Supplementary Submission, Canada remarks that the CWS enforcement program received no complaints from the Submitters regarding the 49 FMPs referenced in the original submission during the period referenced in the submission.⁸⁹ In regard to the one complaint received by the CWS and referenced in Canada's response to the original submission, Canada notes that the complaint was received on 12 July 2001, that receipt was acknowledged on 1 August 2001, and that wildlife officers determined that it did not warrant further action since the logging operations had ceased some time before, making it difficult to collect potential evidence of nest destruction, and MNR indicated that no other logging was planned.⁹⁰

82. *Ibid.*

83. *Ibid.* at 5-6.

84. *Ibid.* at 6.

85. *Ibid.*

86. *Ibid.*

87. *Ibid.*

88. *Ibid.*

89. *Ibid.*

90. *Ibid.* at 6-7. In its comments on the accuracy of the draft factual record, Canada states that Environment Canada's records indicate that the complaint was received

In its response to Ontario Logging II, filed with the Secretariat on 7 December 2004, Canada acknowledges the close relationship between that submission and the Ontario Logging submission and refers the Secretariat to its earlier Response and Response to Supplemental Information. The response also states that the Government of Canada wishes to confirm that CWS did not receive any public complaints with respect to the enforcement of s. 6(a) MBR in any of the four FMUs for the time period specified in the submission.

4. Scope of the factual record

On 6 February 2002, the Submitters filed with the Secretariat a submission alleging “the failure of the Canadian Government to effectively enforce s. 6(a) of the MBR against the logging industry in Ontario.” On 25 February 2002, the Secretariat determined that the submission, SEM-02-001 (Ontario Logging) (“Ontario Logging”), met the requirements of Article 14(1) of the NAAEC and merited requesting a response from the Party in accordance with Article 14(2). The Party submitted its response on 25 April 2002. On 12 November 2002, the Secretariat notified the CEC Council that the submission, in light of the Party’s response, warranted development of a factual record. On 22 April 2003, in Council Resolution 03-05, the Council voted unanimously:

TO DEFER consideration of the Secretariat’s notification of 12 November 2002, pending the following:

- a) the submitters being provided a period of 120 calendar days from the date of this resolution to submit the requisite sufficient information in support of the allegations set forth in SEM-02-001;
- b) the termination of the submission process for SEM-02-001 if the submitters elect not to provide further information within the 120 calendar day time frame;
- c) in the event such further information is provided, the Secretariat determining whether that information warrants a response from Canada or whether the submission process should be terminated;

on July 17th. Canada’s Response to Request for Information, at Tab 5, contains a copy of a letter of complaint dated 12 July 2001, as well as another dated 25 July 2001 and an e-mail dated 17 July 2001, all from the same person on the same topic, and a CWS occurrence report (NEMISIS #3008-2001-08-01-026) listing the occurrence name as “MBCA – Bancroft Minden Forest Company – clear cutting during nesting season,” and listing the occurrence date as 2001/07/12, the reported date as 2001/07/12, and the start date as 2001/07/12.

- d) in the event such a response is requested and provided by Canada, the Secretariat, after considering both the new information provided by the submitters and the response of Canada to that information, notifying Council whether it recommends the preparation of a factual record.

On 20 August 2003, within the 120 calendar day time frame provided in Council Resolution 03-05, the Submitters provided the Secretariat with further information. On 21 August 2003, pursuant to Council Resolution 03-05, the Secretariat determined that the further information provided by the Submitters merited requesting a response from Canada and requested a response. On 16 October 2003, Canada submitted its response. On 17 December 2003, pursuant to Council Resolution 03-05, the Secretariat recommended preparation of a factual record.

On 12 March 2004, pursuant to Council Resolution 04-03 (Appendix 1), the Council voted to:

INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters* under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* for the assertions set forth in Submission SEM-02-001 with regard to alleged failures by Canada to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA), in regard to clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in the forty-nine (49) forest management units located in the Province of Ontario identified by the submitters, which include the five that were amalgamated; [...]

Regarding four FMUs for which the Submitters were unsuccessful in obtaining further information within the 120 calendar day time frame provided in Council Resolution 03-05, in Council Resolution 04-03, the Council stated:

FURTHER RECOGNIZING that information for four forest management units was not available in time to meet the deadline that was established in Council Resolution 03-05 for submitting additional information and therefore was not provided by the submitters;

NOTING that when submitters provide information, the Party is afforded the opportunity to respond to that information; and

FURTHER NOTING that the submitters may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.

On 12 October 2004, the Submitters filed with the Secretariat submission SEM-04-006 (Ontario Logging II) (“Ontario Logging II”), containing additional information regarding the four FMUs that were excluded from the scope of the factual record for Ontario Logging by Council Resolution 04-03 (Cochrane, Shiningtree, Temagami and Wawa, hereinafter “the four FMUs”). On 14 October 2004, the Secretariat asked Canada for a response to Ontario Logging II. Canada provided its response on 8 December 2004. On 17 December 2004, the Secretariat recommended preparation of a factual record for Ontario Logging II, and that the submission be combined with Ontario Logging for the purpose of developing one, consolidated factual record.

On 1 April 2005, in Council Resolution 05-04 (Appendix 1), the Council voted unanimously to:

INSTRUCT the Secretariat to consolidate this submission (SEM-04-006) with the Ontario Logging submission (SEM-02-001) for the purpose of developing one consolidated factual record for both submissions,

FURTHER INSTRUCT, for greater clarity, the Secretariat to include in the consolidated factual record the four (4) forest management units identified by the submitters in SEM-04-006, with respect to the alleged failure by Canada to effectively enforce Section 6(a) of the MBR in regard to clearcut logging activities carried out from 1 January to 31 December 2001 in those units;

DIRECT the Secretariat to provide the Parties with an amended overall work plan to address the four forest management units identified by the submitters in SEM-04-006 and with the opportunity to comment on the amendments; and

REMIND the Secretariat to otherwise prepare the consolidated factual record in accordance with Council Resolution 04-03.

5. Summary of other relevant factual information and facts presented by the Secretariat with respect to matters raised in Council Resolutions 04-03 and 05-04

5.1 Information gathering process

To prepare the consolidated factual record, as instructed by the Council in Council Resolutions 04-03 and 05-04, the Secretariat prepared a Work Plan and an Amended Work Plan and provided them to the Parties, for their comments, on 24 March 2004 and 4 April 2005, respectively (Appendix 2). The Secretariat did not receive any comments regarding the work plan.

Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.” On 30 June 2004, the Secretariat issued a Request for Information for Ontario Logging (Appendix 3), and sent copies to the Parties, the Submitters, the Joint Public Advisory Committee, MNR district managers, the Forest Products Association of Canada, sustainable forest license holders for the forest management units covered by the factual record, nongovernmental organizations, and others. The Submitters responded to the Request for Information on 7 September 2004. MNR responded on 6 October 2004. Canada responded on 2 November 2004. The Secretariat sent Canada a Request for Information for Ontario Logging II and Request for Additional Information for Ontario Logging on 5 May 2005 (Appendix 4). Canada responded on 6 September 2005.

Secretariat staff met with MNR district office staff in Sault Ste. Marie, Ontario on 27 June 2005. It also met with staff from Clergue Forest Management Inc. in Sault Ste. Marie the same day. Secretariat staff met with representatives of MNR’s Forest Policy and Forest Management Planning Sections in Sault Ste. Marie on 28 June 2005. A meeting with the Director General of CWS; the National Director, Wildlife Enforcement, CWS; and the Director, Migratory Birds, CWS, scheduled for 6 June 2005, was cancelled by the Director of the Americas Branch of Environment Canada on 31 May 2005. Thereafter, Canada did not grant the Secretariat’s request to reschedule that meeting or to schedule a meeting with any other federal government employees. On 22 September 2005, Canada stated in a letter to the Secretariat: “Meetings between government officials and CEC Secretariat staff should not be one of the regular relied-upon means of collecting information. Although, there are delays in providing written responses, we believe that it is preferable to respond in writing to the Secretariat’s inquiries to ensure that the right information is provided.” Canada also asked that the Americas Branch of Environment Canada be notified in advance prior to making any phone calls to federal government officials. MNR also asked that requests for information be put in writing to the Forest Policy Section. On 17 October 2005, the Secretariat sent MNR a written request for information regarding how forest management planners in Ontario calculate the “natural benchmark scenario” for the purpose of planning forestry operations to emulate natural disturbance patterns. On 2 November 2005, MNR stated that it would reply in the week of 14 November 2005. The Secretariat did not receive a reply from MNR. Secretariat staff also

met with Tembec's manager for aboriginal and environmental relations (7 February 2005) and had several telephone conversations with and received written information from the Director of Conservation Biology at the Forest Products Association of Canada.

The Secretariat retained the services of two independent experts, Dr. Fiona Schmiegelow and Dr. David Euler, for assistance in developing the factual record. Dr. Euler holds a Ph.D. in wildlife science from Cornell University. He worked for MNR from 1979-1995, developing and providing advice on forestry law and policies, as well as identifying research needs related to wildlife conservation in a forestry context. In the late 1980's, Dr. Euler appeared before Ontario's Environmental Assessment Board as MNR's expert witness on wildlife habitat issues associated with logging. From 1995-2000 he was Dean, Faculty of Forestry, at Lakehead University. Since 2001, he has been a volunteer member on the province's Provincial Forest Technical Committee, providing advice to MNR on the adequacy of Ontario's forest management planning guides in meeting habitat needs of wildlife. He is also a regional coordinator for Ontario's Breeding Bird Atlas, and works as an auditor of forest management within Ontario's independent forest audit system. Dr. Euler has published widely on wildlife issues associated with logging, and has an in-depth knowledge of the operation of Ontario's forest management system as it relates to wildlife conservation.

Dr. Schmiegelow holds a Ph.D. in applied ecology and conservation from the University of British Columbia. She is an Associate Professor at the University of Alberta, Department of Renewable Resources. Her general interests are in the areas of community and landscape ecology, and applied conservation biology. Much of her research focuses on the broad-scale effects of land-use policies and practices on wildlife, with an emphasis on northern forests. Using both field-based and modeling approaches, she seeks to better understand the interactions between human activities and natural diversity, in order to evaluate existing, and explore potential, land management strategies. Within the Sustainable Forest Management Network, she is the leader of the *Boreal Ecology and Economics Synthesis Team*. She recently initiated the *Canadian BEACONs Project*, a large-scale analysis of conservation needs and strategies in Canada's boreal forest. Professor Schmiegelow has published many research papers on bird conservation issues in managed forests.

NAAEC Article 15(5) stipulates that "the Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 thereafter," and Article 15(6) stipulates that "the Secretariat shall incorporate, as appropriate, any such

comments in the final factual record and submit it to the Council.” The Secretariat submitted the draft factual record to the Council on 31 March 2006 and received comments from Canada and the United States on 18 May 2006. Mexico did not comment on the draft factual record.

In its comments on the accuracy of the draft factual record, Canada stated:

We recognize that consideration of how the Government of Canada’s enforcement of section 6(a) of the *Migratory Bird Regulations* was influenced by the Ontario government’s enforcement practices and policies may be relevant to the scope of the Factual Record. However, in its response of April 11, 2002, the Government of Canada does not refer to or rely on the enforcement policies or procedures of the Ontario Government in responding to the assertions contained in the submission. Moreover, as noted in that response, ‘approval of a provincial FMP (forest management plan) does not absolve companies of their responsibilities toward the federal MBCA.’ Accordingly, the scope of the discussion of Ontario’s legislative and regulatory framework should be limited to those matters which have a direct link to the Government of Canada’s enforcement policies and practices, since that is the focus of the factual record.

The United States, in its comments on the accuracy of the draft factual record, stated:

The United States emphasizes its support of Canada’s comments concerning the extent to which the factual record focuses on numerous matters, such as Ontario’s regulation of the logging industry, that do not appear to pertain directly to the alleged failure of Canada to effectively enforce section 6(a) of the Migratory Birds Convention Act [*sic*].

In preparing the factual record, the Secretariat sought to gather all information relevant to considering whether Canada is failing to effectively enforce s. 6(a) of the MBR in connection with potential violations of s. 6(a) of the MBR associated with clearcut logging in 53 forest management units, particularly during the migratory bird nesting season, in Ontario in 2001. Specifically, the Secretariat sought to gather all information relevant to considering the factual context of forest management in Ontario, as it relates to the issue of complying with the prohibition contained in s. 6(a) of the MBR, and the approach taken by Canada to enforcing and promoting compliance with s. 6(a) of the MBR within that context. The context of forest management is complex and multi-faceted. The Secretariat gathered information on facets of forest management that are directly relevant to complying with and enforcing s. 6(a) of the MBR, but did not gather information on aspects of forest management

that may have an effect on, but are not directly relevant to, compliance with or enforcement of s. 6(a) of the MBR (e.g. mill licenses, etc.). Information on forest management in Ontario is provided solely for the purpose of understanding the factual context, identified by the Submitters, for enforcing and promoting compliance with s. 6(a) of the MBR.

5.2 *Meaning and scope of s. 6(a) of the MBR*

This section provides relevant information concerning the context, constitutional basis for, and scope of s. 6(a) of the MBR, as well as powers provided by law for enforcing s. 6(a).

5.2.1 *Context for the prohibition contained in s. 6(a) of the MBR*

S. 6(a) of the MBR makes it an offense to disturb, destroy or take a nest of a migratory bird without a permit.⁹¹ It is one of the central federal law provisions that prohibit interfering with, or polluting, places frequented by migratory birds or fish.⁹² Prohibitions contained in these provisions are drafted in broad language which focuses on effects (e.g. nest destruction, harmful alteration of fish habitat) rather than listing prohibited activities.⁹³ The provisions apply everywhere in Canada, on

91. *Migratory Birds Regulations*, C.R.C., c. 1035, s. 6(a).

92. Ss. 6(a) and 35(1) of the MBR (s. 35(1): "Subject to subsection (2), no person shall deposit or permit to be deposited oil, oil wastes or any other substance harmful to migratory birds in any waters or any area frequented by migratory birds"), and ss. 35(1) and 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14. S. 35(1): "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat." S. 36(3): "Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water. (In 2005, s. 35(1) was repealed and replaced with a new s. 5(1): (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area. (2) No person or vessel shall deposit a substance or permit a substance to be deposited in any place if the substance, in combination with one or more substances, results in a substance – in waters or an area frequented by migratory birds or in a place from which it may enter such waters or such an area – that is harmful to migratory birds. 3) Subsections (1) and (2) do not apply if (a) the deposit is authorized under the *Canada Shipping Act*; or (b) the substance is of a type and quantity, and the deposit is made under conditions, authorized under an Act of Parliament other than the *Canada Shipping Act*, or authorized by the Minister for scientific purposes. S.C. 2005, c. 23, s. 4.)

93. Commission for Environmental Cooperation, "Factual Record – Oldman River II Submission (SEM-97-006)," (2003) 15 *N.A.E.L.P.* 1 [hereinafter *Oldman River*

public and private land, to individuals, corporations, and governments.⁹⁴ Those found to have violated the provisions can avoid legal sanction by a number of means, including by proving, on a balance of probabilities, that they exercised reasonable care in trying to avoid committing the offense.⁹⁵ Violations are punishable by fines and/or prison terms, and violators can be ordered to take actions to redress the damage they have caused.⁹⁶

Recognizing that in certain cases legitimate human activities can and will impact upon places frequented by migratory birds or fish, the law generally provides two means for allowing such activities to go forward without the risk of legal sanction: on one hand, the government can issue permits or authorizations exempting the harmful activities from the statutory prohibition and requiring that measures be taken to minimize negative effects on the protected resource.⁹⁷ On the other hand, the government can adopt regulations setting pollution standards or prescribing measures to be taken in order to minimize impacts of projects or activities on the resource.⁹⁸ Regulations can also list categories of projects or activities for which permits or authorizations are required.⁹⁹ In order to be valid, permits or authorizations and regulations must be consistent with the purpose of the enabling legislation.¹⁰⁰ In addition, the issuance of permits or authorizations must sometimes be preceded by an environmental assessment,¹⁰¹ and the promulgation of regulations is usually preceded by a regulatory impact analysis prepared as part of an overall notice and comment process.¹⁰²

5.2.2 *Origins of s. 6(a) of the MBR*

5.2.2.1 *The Migratory Birds Convention, 1916*

The prohibition contained in s. 6(a) of the MBR has been in force in Canada for almost a century. In 1916, Great Britain (on behalf of Canada) and the United States entered into the *Migratory Birds Convention*,

Factual Record] at ss. 5.2, 5.4 and Commission for Environmental Cooperation, "Factual Record – BC Mining Submission (SEM-98-004)," (2003) 13 *N.A.E.L.P.* 1 [hereinafter BC Mining Factual Record] at s. 5.2.

94. *Ibid.*

95. *Ibid.* and *infra*, s. 5.2.3.3.

96. *Ibid.*

97. *Ibid.*

98. *Ibid.*

99. *Ibid.*

100. See *infra* note 125.

101. See *infra* note 143.

102. See *infra* note 125.

1916,¹⁰³ in response to growing concerns,¹⁰⁴ amongst conservationists, hunters, and ammunition makers,¹⁰⁵ that populations of migratory game birds were in precipitous decline because of an increase in subsistence hunting,¹⁰⁶ and because hunters now had access to automobiles, automatic and pump shotguns, and refrigeration,¹⁰⁷ and were not complying with provincial and state game laws. Because the birds didn't stay in one place, and because there was no assurance that "close seasons"¹⁰⁸ for hunting would be respected in other jurisdictions, the temptation existed for hunters in each state or province to maximize their take

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103. *Migratory Birds Convention, 1916*, United Kingdom and United States, 16 August 1916 (Schedule to the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22 (MBCA, 1994)) [hereinafter the "Migratory Birds Convention" or the "Convention"].
 104. J.C. Phillips, "Migratory Bird Protection in North America – The History of Control by the United States Federal Government and a Sketch of the Treaty with Great Britain," Special Publication of the *American Committee for International Wild Life Protection*, Vol. I, No. 4, 1934 at 5: "So, too, the idea of the necessity for protection of those species which nested far beyond our borders dawned very slowly on the minds of sportsmen and lawmakers. There was a hazy kind of faith in the existence far north of our borders of a sort of mysterious duck and snipe factory which could turn out the required supply practically forever."
 105. Kurkpatrick Dorsey, *The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era* (Seattle: U. of Washington Press, 1998) at 185.
 106. Canada. Commission of Conservation, Committee on Fisheries, Game and Fur-Bearing Animals, "Conservation of Wild Life in Canada in 1917: A Review," by C. Gordon Hewitt, Consulting Zoologist, Department of Agriculture (Reprinted from the Ninth Annual Report of the Commission on Conservation), Ottawa, 1918 at 18: "It is very desirable that, at the present critical period in the history of the country and the world generally, we should consider what relation our wild life bears to the chief problems with which we are faced, namely, the production and conservation of food supplies. In their relation to this problem, the native mammals and birds may be divided into three classes: (1) Sources of food; (2) Protectors of food; and (3) Destroyers of food. [...] From all reports that I have received, it would appear that a greater number of persons have availed themselves this year of the presence of a native meat supply in the different provinces. In many cases, it was not in the interests of sport that they ranged the woods, but as a result of the most primitive and impelling motive – to secure food. There is little doubt in my mind that throughout the country full advantage has been taken of the opportunity to secure wild meat. It has been suggested that the game laws of the various provinces might be relaxed to permit a greater use of our wild life as a source of food. [...] The relaxation of our game laws would be wholly inimical to the welfare of our game mammals and birds and completely opposed to the strenuous efforts that are now being made by the Dominion and Provincial Governments to secure better protection for game of all kinds. The chief cause of the depletion of our game resources has been either the absence of game laws or laxity in their enforcement."
 107. Kurkpatrick Dorsey, *The Dawn of Conservation Diplomacy: U.S.-Canadian Wildlife Protection Treaties in the Progressive Era* (Seattle: U. of Washington Press, 1998) at 172.
 108. The Convention refers to "close seasons" and not "closed seasons;" see art. II(1) of the Convention.

while the birds were passing through their area.¹⁰⁹ An international treaty was seen as a fitting way to address these concerns, and also as a means of protecting federal migratory birds legislation from constitutional challenge on the grounds that it encroached upon provincial/state jurisdiction.¹¹⁰

The objects of the Convention are as follows:

Whereas many species of birds in the course of their annual migration traverse certain parts of the Dominion of Canada and the United States; and

Whereas many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both Canada and the United States, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds;

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, and the United States of America, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects [...].

Under the Convention, “as an effective means of preserving migratory birds,” hunting migratory game birds was – subject to certain limited exceptions – prohibited between 10 March and 1 September,¹¹¹ and the Convention further specified that the hunting season could last no more than three and a half months.¹¹² The Convention established a continuous close season for migratory insectivorous birds and other migratory nongame birds, except as regards subsistence needs of Eskimos and Indians.¹¹³ It provided further:

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific or propagating purposes

109. Mr. J.J. Pringle, quoted in John C. Phillips, “Migratory Bird Protection in North America – The History of Control by the United States Federal Government and a Sketch of the Treaty with Great Britain,” (1934) 1 *Special Publication of the American Committee for International Wild Life Protection* No. 4 at 6: “The birds (snipe) were such migrants, and only in the country for a short time, I had no mercy on them, and killed all I could, for a snipe once missed might never be seen again.”

110. J. Alexander Burnett, “A Passion for Wildlife: A History of the Canadian Wildlife Service, 1947-1997,” (1999) 113 *The Canadian Field-Naturalist* No. 1 at 8.

111. Art. II.1 of the Convention.

112. *Ibid.*

113. *Ibid.* at Art. II.

under such laws or regulations as the High Contracting Powers may severally deem appropriate.¹¹⁴

For the purpose of preserving migratory birds, the Convention thus created a framework within which to allow hunting of migratory game birds to continue throughout Canada and the United States whilst maintaining populations, a framework that limited the number of days per year during which hunting could take place, prohibited hunting during the nesting season, and allowed for the imposition of further restrictions, at the discretion of each High Contracting Power. As regards the taking of nests or eggs, the Convention contained an outright prohibition, subject to certain very limited exceptions (scientific or propagating purposes).¹¹⁵

Finally, the Convention provided:

The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.¹¹⁶

5.2.2.2 The *Migratory Birds Convention Act*

At confederation, in 1867, the power to make laws in Canada was distributed between the new Parliament and the former colonies.¹¹⁷ The Constitution contains lists of matters falling under the respective legislative jurisdictions of Parliament and the provincial legislatures.¹¹⁸ For example, under s. 91(12) of the Constitution, Parliament has exclusive power to legislate respecting “Sea Coast and Inland Fisheries,” and the *Fisheries Act* (1868) is the federal law which contains fish habitat protection and pollution prevention provisions.¹¹⁹ At confederation, neither order of government was given exclusive legislative jurisdiction over migratory birds, but s. 132 of the Constitution provided:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

114. *Ibid.* at Art. V.

115. *Ibid.*

116. *Ibid.* at Art. VIII.

117. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91 & 92, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter the “Constitution”].

118. *Ibid.*

119. Ss. 35(1) and 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

Therefore, in accordance with s. 132 of the Constitution, Parliament has jurisdiction to perform the obligations of “Canada or of any Province thereof” towards the United States under the Convention, including taking measures to ensure the execution of the Convention.

Canada passed the *Migratory Birds Convention Act* (MBCA) in 1917.¹²⁰ The Act contained definitions for the terms “close season,” “migratory game birds” and “migratory insectivorous birds;” provided a list of regulation making powers; spelled out the powers and duties of game officers; and made it an offence – punishable on summary conviction by a fine ranging from ten to one hundred dollars, and/or a prison term not exceeding six months – to violate any provision of the Act or regulations made thereunder.

Regulation-making powers under the MBCA were worded as follows:

- (1) The Governor in Council may make such regulations as are deemed expedient to protect migratory game, migratory insectivorous and migratory nongame birds which inhabit Canada during the whole or any part of the year.
- (2) Subject to the provisions of the said Convention, such regulations may provide, –
 - (a) the periods in each year or the number of years during which any such migratory nongame birds shall not be killed, captured, injured, taken, molested or sold, or their nests or eggs injured, destroyed, taken or molested;
 - (b) for the granting of permits to kill or take migratory game, migratory insectivorous and migratory nongame birds, or their nests or eggs;
 - (c) for the prohibition of the shipment or export of migratory game, migratory insectivorous or migratory nongame birds or their eggs from any province during the close season in such province, and the conditions upon which international traffic in such birds shall be carried on;
 - (d) for the prohibition of the killing, capturing, taking, injuring or molesting of migratory game, migratory insectivorous or migratory nongame birds, or the taking injuring, destruction or molestation of their nests or eggs, within any prescribed area;

120. *Migratory Birds Convention Act*, 7-8 Georg V, c. 18.

- (e) for any other purpose which may be deemed expedient for carrying out the intentions of this Act and the said Convention, whether such other regulations are of the kind enumerated in this section or not.¹²¹

The MBR were published in 1918. Challenges to the constitutionality of the MBCA and the MBR were resolved in favour of the federal government and conflicting provisions in provincial game laws were struck down.¹²² Over the years, courts consistently upheld MBCA provisions in the face of allegations that they violated aboriginal treaty rights,¹²³ but the CWS pursued a “non-enforcement” policy in regard to aboriginal hunting activities,¹²⁴ and on occasion – faced with situations that had not been anticipated in 1916 – adopted regulations that were not contemplated by the terms of the Convention or the MBCA.¹²⁵ In 1982, with the patriation of the Constitution, existing aboriginal and treaty rights were

121. Art. 4(2) of the MBCA.

122. *R. v. Clarke* (1920), Charlottetown RG 6.1 (P.E.I.S.C. (A.D.)) at 3: “This uniform system of protection designed to save from “indiscriminate slaughter” and for the preservation of “such Migratory birds as are useful to man” is not within the powers of any Provincial Legislature, though as between the Province and its people it may regulate the killing and sale of such birds. A uniform system can only be accomplished in the language of the Judgment of the Supreme Court of the United States “by national action in concert with another Power.” See also *R. v. Stuart*, [1925] 1 D.L.R. 12 (Man. C.A.).

123. *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), aff’d [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267; *Daniels v. R.*, [1968] S.C.R. 517.

124. Three weeks after the Supreme Court of Canada rendered its decision in the *Daniels* case, the Director of the CWS wrote to the RCMP and provincial and territorial wildlife directors, stating: “The recent decision of the Supreme Court of Canada in the *Daniels* case affirms that the *Migratory Birds Convention Act* and Regulations apply to Indians in the Prairie Provinces. That judgment and the earlier judgments in the *Sikyea* case and the *George* case make it quite clear that the *Migratory Birds Convention Act* and Regulations apply to all Canadians whatever the circumstances. Notwithstanding those judgments, the policy of this Department is that Indians and Eskimos may take migratory birds for food”; quoted in *R. v. Catagas* (1977), 38 C.C.C. (2d) 296 at 400 (Man. C.A.).

125. For example, when Newfoundland became a province of Canada in 1949, the federal government needed to address the fact that murrelets – listed as migratory nongame birds under Art. I(3) of the Convention and therefore subject to a continuous close season under Art. II(3) of the Convention – were hunted on a large scale for subsistence purposes in that province. These activities were addressed first, through an Order in Council issued in 1956, then by an administrative order issued in 1993, and finally through amendments to the MBR in 2000 which made it possible to control hunting methods and equipment, in addition to defining periods, zones and/or quotas. See Regulatory Impact Analysis Statement in *Regulations Amending the Migratory Birds Regulations*, C. Gaz., Vol. 134, No. 28 (8 July 2000).

recognized and affirmed,¹²⁶ and in 1990, the Supreme Court of Canada held that in order to limit an aboriginal right to fish, the Government of Canada must establish that the limitation is justified in the circumstances.¹²⁷ This decision also applies to the right to hunt migratory birds. In 1995, the Convention was amended to make it consistent with aboriginal and treaty rights.¹²⁸ The MBR have been and continue to be amended regularly to adjust closed seasons for hunting of migratory birds.¹²⁹

5.2.2.3 The Parksville Protocol

The 1995 “Parksville Protocol” amended the Convention in order to bring it “[...] into line with the rights of Aboriginal people of Canada and the regulatory and conservation regimes defined in aboriginal treaties, land claims and self-government agreements,” and to “[...] enable action to improve the conservation of migratory birds and to maintain an effective Convention as the basis for continued cooperation between Canada and the United States in the management of migratory birds.”¹³⁰ In the Preamble to the Protocol, the governments of Canada and the United States stated that they were:

DESIRING to amend and update the Convention to enable effective actions to be taken to improve the conservation of migratory birds;

COMMITTED to the long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values through a more comprehensive international framework that involves working together to cooperatively manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information;

[...]

126. *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

127. *Sparrow v. R.*, [1990] 1 S.C.R. 1075.

128. Protocol between the Government of Canada and the Government of the United States of America amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, S.C. 1994, c. 22, Sch.; SOR/2000-189 [hereinafter the “Parksville Protocol” or the “Protocol”].

129. CWS Waterfowl Committee, “Migratory Game Bird Hunting Regulations in Canada,” (2003) *CWS Migr. Birds Regul. Rep.* No. 9 at 12.

130. Canada, “Interpretation Document of the Canadian Delegation for the 1995 Parksville Protocol Amending the Migratory Birds Convention” (Ottawa: CWS, 2000) [hereinafter the “Interpretation Document”] at 1.

In Canada's Interpretation Document for the Parksville Protocol, Canada explains:

By adding a reference to the protection of lands and waters on which the birds depend, it was the intention of the Parties to the Protocol to emphasize the importance of environment in the conservation and management of migratory birds.

The Protocol deleted Article II of the Convention and replaced it with a new Article II that includes the following statement of conservation principles and list of means for giving effect to those principles:

The High Contracting Powers agree that, to ensure the long-term conservation of migratory birds, migratory bird populations shall be managed in accord with the following conservation principles:

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

Means to pursue these principles may include, but are not limited to:

- Monitoring, regulation, enforcement and compliance;
- Co-operation and partnership;
- Education and information;
- Incentives for effective stewardship;
- Protection of incubating birds;
- Designation of harvest areas;
- Management of migratory birds on a population basis;
- Use of aboriginal and indigenous knowledge, institutions and practices; and
- Development, sharing and use of best scientific information.

Canada's Interpretation Document states:

The identified conservation principles while acknowledging "a variety of sustainable uses" emphasize the need to sustain healthy populations for

harvesting needs, to provide and protect habitat and to restore populations. The emphasis is on conservation for the migratory bird species as well as on regulation of the harvest.¹³¹

The Protocol deleted Article III of the Convention and replaced it with a new Article III that provides:

The High Contracting Powers agree to meet regularly to review progress in implementing the Convention. The review shall address issues important to the conservation of migratory birds, including the status of migratory bird populations, the status of important migratory bird habitats, the effectiveness of management and regulatory systems and other issues deemed important by either High Contracting Power. The High Contracting Powers agree to work cooperatively to resolve problems in a manner consistent with the principles underlying this Convention, and, if the need arises, to conclude special arrangements to conserve and protect species of concern.

Canada's Interpretation Document states:

The Article provides that Canada and the United States agreed to work to implement the amendments by resolving identified problems and conclude special arrangements to conserve and protect species of concern "in a manner consistent with the principles underlying this Convention." Those principles include not only the conservation principles but also respect for and protection of aboriginal and treaty rights of the Aboriginal peoples of Canada, the use of aboriginal and indigenous knowledge, institutions and practices and the respect for aboriginal and indigenous knowledge and institutions.¹³²

The Protocol also amended Article IV of the Convention by removing the reference to special protection for wood ducks and eider ducks and replacing it with the following provisions:

Each High Contracting Power shall use its authority to take appropriate measures to preserve and enhance the environment of migratory birds. In particular, it shall, within its constitutional authority:

- (a) seek means to prevent damage to such birds and their environments, including damage resulting from pollution;
- (b) endeavour to take such measures as may be necessary to control the importation of live animals and plants which it determines to be hazardous to the preservation of such birds;

131. Interpretation Document at 5.

132. *Ibid.* at 10.

- (c) endeavour to take such measures as may be necessary to control the introduction of live animals and plants which could disturb the ecological balance of unique island environments; and
- (d) pursue cooperative arrangements to conserve habitats essential to migratory bird populations.

In regard to these provisions, the Interpretation Document states:

The Protocol replaces the 1916 Article IV with a new Article IV which introduces important commitments towards preserving and enhancing the environment of migratory birds.¹³³

The Protocol replaces Article V of the Convention with the following text:

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific, educational, propagating or other specific purposes consistent with the principles of this Convention under such laws or regulations as the High Contracting Powers may severally deem appropriate, or as provided for under Article II, paragraph 4.

Finally, Article VI of the Protocol provides:

This Protocol is subject to ratification. This Protocol shall enter into force on the date the parties exchange instruments of ratification, shall continue to remain in force for the duration of the Convention and shall be considered an integral part of the Convention particularly for the purpose of its interpretation.¹³⁴

Canada's Interpretation Document states:

The purpose of this provision is to clarify the status of the Protocol and ensure that the Protocol, including particularly its Preamble, can be used in the interpretation of the Convention. [...] ¹³⁵

133. *Ibid.* at 11. While the Canadian Interpretation Document refers to Article IV as "important commitments," the U.S. State Department report on the Protocol states that Article IV, "[...] does not, as a practical matter, require either Party to take any steps in this area in addition to those already being taken under existing domestic legal authority;" Marian Nash (Leich), Consultant, Office of the Legal Adviser, Department of State, "Contemporary Practice of the United States Relating to International Law," (1996) 90 *A.J.I.L.* 647 at 652.

134. The Protocol took effect 7 October 1999.

135. Interpretation Document at 12.

The Federal Court of Canada has interpreted provisions of the MBCA and MBR by reference to the text of the Convention, including by considering the intention of the High Contracting Powers as reflected in the Preamble to the Convention.¹³⁶ There are differences of opinion regarding whether the Convention – as worded in 1916 – provides authority for Parliament to enact regulations for the protection of migratory bird habitat (beyond prohibiting nest destruction) on lands other than federal lands.¹³⁷

136. *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (F.C.T.D.), online: Office of the Commissioner for Federal Judicial Affairs <<http://reports.fja.gc.ca/fc/1999/pub/v3/1999fc24281.html>> (date accessed: 19 May 2005); *Animal Alliance of Canada v. Canada (A.G.)*, [1999] 4 F.C. 72 (T.D.), online: Office of the Commissioner for Federal Judicial Affairs <<http://recueil.cmf.gc.ca/fc/1999/pub/v4/1999fc24569.html>> (date accessed: 19 May 2005).

137. The position of CWS has been that the Convention provided no such authority prior to the coming into force of the Parksville Protocol in 1999 and that unlike the original Convention, which was covered by s. 132 of the Constitution, implementing the terms of the Parksville Protocol does require reaching agreement with the provinces. See CWS PowerPoint Presentation, “Migratory Birds Regulations: The disturbance, destruction, and take of migratory birds incidental to other activities” (31 January 2001 meeting between CWS and Forest Products Association of Canada), slide 22: “The facts about bird habitat,” second bullet: “Habitat is not protected under the MBC (Migratory Birds Convention)” and slide 37: “Implications for Migratory Bird Conservation in Canada,” second bullet: “Provincial participation identified as a top priority because of provincial ownership and jurisdiction” in “Canada’s response to the Secretariat’s request for information relevant to the factual record for submission SEM-02-001 (Ontario Logging)” (undated) at Tab 7. In its comments on the accuracy of the draft factual record, Canada stated: “The PowerPoint presentation referred to in this note is a schematic document that was supplemented by additional comments. It is not a completely accurate representation of the federal government position on whether the Convention – as worded in 1916 – provides authority for Parliament to enact regulations for the protection of migratory bird habitat (beyond prohibiting nest destruction) on lands other than federal lands. Reliance on a PowerPoint presentation to convey the position of CWS on habitat is overly simplistic and misleading as the PowerPoint presentation was not intended to be a stand alone document, and was accompanied by an oral presentation.” On the other hand, in a legal opinion delivered to the Sierra Legal Defence Fund in 1999, former Supreme Court of Canada Justice Gerard V. La Forest and constitutional law expert Professor Dale Gibson stated: “In sum, federal authority to protect migratory birds habitat, in all likelihood, arises from the explicit or implicit terms of the Convention. However, even if that were not the case, it is almost certain that habitat protection, as part of an overall scheme to protect migratory birds (or endangered species), would be found to be ‘necessarily incidental’ to achieving the objectives and obligations of the Convention, and thus within federal jurisdiction pursuant to section 132 of the Constitution. In sum, federal authority to protect migratory birds under the Convention and s. 132 of the Constitution includes the power to legislate respecting preservation of their necessary habitat. That conclusion derives independently from the Convention’s explicit and implicit purposes, as well as from its operative provisions and Parliament’s power to deal with matters

5.2.3 S. 6(a) of the MBR and logging

This section provides background information regarding the application of s. 6(a) of the MBR in connection with migratory bird nest destruction during logging.

5.2.3.1 Jurisdiction to regulate logging impacts on migratory birds

This factual record concerns an allegation that Canada is failing to effectively enforce a federal prohibition on disturbing, destroying or taking nests of migratory birds in connection with logging activities that took place on provincial Crown land in central and northern Ontario in 2001. In Canada, in accordance with the provisions of the Constitution, most public land belongs to the provinces.¹³⁸ Title to public lands carries with it ownership of the natural resources on those lands. In addition, since 1982, the Constitution specifies that provincial legislatures have exclusive legislative jurisdiction to make laws in relation to the “development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom.”¹³⁹ Subject to any pending aboriginal land claims, the forested areas referenced by the Submitters in the submission are owned by the Government of Ontario. As the owner, the provincial government can sell or lease those lands to third parties (for example, for logging). Under the Constitution, the province has exclusive power to authorize and regulate logging on those lands.

In the past, a *Fisheries Act* provision that prohibited throwing logging debris into fish-bearing waters – without mentioning harm to fish – was struck down by the Supreme Court of Canada as infringing on pro-

necessarily incidental to them.” Hon. Gerard V. La Forest and Dale Gibson, “Constitutional Authority for Federal Protection of Migratory Birds, Other Cross-Border Species, and their Habitat in Endangered Species Legislation” (November 1999) at 14.

138. S. 109 of the Constitution: “All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines and Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.” S. 117 of the Constitution: “The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.”
139. S. 92A of the Constitution. See also s. 92(5) of the Constitution.

vincial legislative jurisdiction.¹⁴⁰ The federal government has not acted, under the MBCA, 1994, to regulate the destruction of migratory bird nests during logging on provincial Crown land, though the Convention was amended in 1995 to give each of the High Contracting Powers latitude in identifying specific purposes for which the taking of nests may be permitted,¹⁴¹ and Parliament has adopted amendments to the MBCA, 1994, that extend the scope of regulation-making powers to include making regulations “respecting the conditions and circumstances under which migratory birds may be killed, captured, injured, taken or disturbed, or nests may be damaged, destroyed, removed or disturbed.”¹⁴²

Of the four federal law provisions that prohibit damaging or polluting places in Canada frequented by migratory birds or fish, one (the *Fisheries Act* habitat protection provision) has an operative permit component which allows authorizations to be issued that legalize otherwise illegal activity (harmful alteration, disruption or destruction of fish habitat). In those cases where the undertaking or activity requiring a *Fisheries Act* authorization qualifies as a project as defined in the *Canadian Environmental Assessment Act* (CEAA), an environmental assessment must be carried out under CEAA before the *Fisheries Act* authorization can be issued.¹⁴³ When an environmental assessment under CEAA showed that a mining project in Alberta would result in the deposit of harmful substances in waters frequented by migratory birds, contrary to s. 35(1) of the MBR, the Federal Court of Canada stated in *obiter dictum* that the federal government would be acting “contrary to law” within the meaning of section 18.1(4)(f) of the *Federal Court Act*¹⁴⁴ if it were to issue an authorization for the harmful alteration of fish habitat under s. 35(2) of the *Fisheries Act* without promulgating exempting regulations under the authority of s. 35(2) of the MBR to address the deposit of harmful substances in waters frequented by migratory birds.¹⁴⁵

140. See *R. v. Fowler*, [1980] 2 S.C.R. 213.

141. Art. V of the Convention now reads: “The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific, educational, propagating or other specific purposes consistent with the principles of this Convention under such laws or regulations as the High Contracting Powers may severally deem appropriate, or as provided for under Article II, paragraph 4” [emphasis added].

142. S. 12(h.1) of the *Migratory Birds Convention Act, 1994* (as amended June, 2005).

143. See s. 6(e) of Part I of Schedule I of the *Law List Regulations*, SOR/94-636.

144. R.S.C. 1985, c. F-7.

145. *Alberta Wilderness Association v. Cardinal River Coals*, [1999] 3 F.C. 425 (T.D.), online: Office of the Commissioner for Federal Judicial Affairs <<http://reports.fja.gc.ca/fc/1999/pub/v3/1999fc24281.html>> (date accessed: 19 May 2005). But see *Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans)*, 2005 FC 1123 (TD), regarding whether Fisheries and Oceans Canada erred in issuing a *Fisheries Act* authorization that did not contain conditions for protecting migratory birds, particularly Harlequin Ducks.

5.2.3.2 Responses to violations of s. 6(a) of the MBR

In the absence of provisions in the MBR that would allow CWS to issue permits for the destruction of migratory bird nests during logging, companies and individuals that destroy nests of migratory birds during logging are subject to the prohibition contained in s. 6(a) of the MBR. Under the MBCA, 1994, a person who contravened the MBR in 2001 is liable, on summary conviction, to a maximum fine of \$50,000 (double for a corporation) and/or a prison term not to exceed six months, and on indictment, a maximum fine of \$100,000 (\$250,000 for a corporation) and/or imprisonment for up to five years.¹⁴⁶ Repeat offenders face a doubling of the fine amount.¹⁴⁷ Each day on which an offence is committed or continues constitutes a separate offence,¹⁴⁸ and the fine for an offence involving the destruction of more than one migratory bird nest can be calculated as though the destruction of each nest were a separate offence.¹⁴⁹ In addition, under the MBCA, 1994, the court is allowed to consider whether a person convicted of an offence under the Act received monetary benefits as a result of committing the offence, and the court may impose an additional fine in an amount equal to the estimated monetary benefit, even though such fine may exceed the maximum fine provided under the Act.¹⁵⁰ Persons convicted under the Act may be ordered by the court to do or refrain from doing certain things, having regard to the nature of the offence and the circumstances surrounding its commission.¹⁵¹ Summary conviction proceedings must be commenced within two years of the federal Minister of the Environment or the provincial minister responsible for the protection of wildlife becoming aware of the subject-matter of the proceedings.¹⁵² There is no limitation period for proceedings by way of indictment.

In order to secure a conviction for a violation of s. 6(a) of the MBR, the Crown needs to prove beyond a reasonable doubt that the accused disturbed, destroyed or took a nest of a migratory bird. It is not necessary for the Crown to prove that the accused intended to do so, only that the accused did do so.

146. S. 13(1) of the MBCA, 1994. (n.b. The Act was amended in 2005 to raise the maximum fine, on summary conviction, to \$300,000. The terms "individual" and "corporation" were replaced by the single term "person". On indictment, the maximum fine was increased to \$1,000,000 and the jail term lowered to a maximum of three years. S.C. 2005, c. 23, s. 9).

147. *Ibid.*, s. 13(2).

148. *Ibid.*, s. 13(3).

149. *Ibid.*, s. 13(4).

150. S. 13(5) of the MBCA, 1994.

151. *Ibid.*, s. 16.

152. *Ibid.*, s. 18.

5.2.3.3 Defenses to charges under s. 6(a) of the MBR

If the Crown meets its burden of proof, the accused can avoid being convicted of violating s. 6(a) of the MBR if the accused can prove, on a balance of probabilities, that all reasonable care was taken to avoid committing the offence.¹⁵³ The Common Law provides other defenses as well, such as a reasonable belief in mistaken facts, “officially induced error,” or “abuse of process.” The defenses of officially induced error and abuse of process both exist to prevent someone from being convicted for action or inaction that, at the time it occurred, appeared (from the perspective of a reasonable person) to meet with government approval. Information on these defenses is provided below.

A defendant must satisfy four conditions to invoke the defense of officially induced error of law successfully.¹⁵⁴ It must have considered its legal position and sought advice about it; consulted an appropriate official; obtained erroneous advice that was reasonable in the circumstances; and relied on that advice. The Supreme Court of Canada has held that because it functions as an “excuse” and not as a “justification” for wrongful behavior – and therefore results in a stay of proceedings rather than an acquittal – an officially induced error of law argument “will only be successful in the clearest of cases.”¹⁵⁵

Depending on the circumstances, advice from provincial officials regarding the requirements of a federal statute can provide a basis for a defense of officially induced error, “[...] provided that a reasonable person would consider that particular government organ to be responsible for the law in question. The determination relies on common sense rather than constitutional permutations.”¹⁵⁶

153. In *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1326, a case which involved a pollution offence under the *Ontario Water Resources Act*, the Supreme Court of Canada described such “strict liability” offences as follows: “Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*: the doing of the prohibited act *prima facie* imports the offence, leaving it to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act of omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.”

154. See *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510, at paras. 25-38. See also *R. v. Cancoil Thermal Corporation* (1986), 11 C.C.E.L. 219 (Ont. C.A.) and *Maitland Conservation Authority v. Cranbrook Swine Inc.*, 2003 CanLII 41182, (2003), 64 O.R. (3d) 417 (C.A.).

155. *R. v. Jorgensen*, *supra* at para. 37.

156. *Ibid.* at para. 31.

The existence of a permit or approval is sometimes invoked as providing the basis for a defense of officially induced error. In such cases the defendant claims that it honestly, reasonably and mistakenly believed that by complying with the permit, it was satisfying all requirements under the law. In a 1998 report on Environment Canada's enforcement of the *Fisheries Act* pollution prevention provision, the House of Commons Standing Committee on Environment and Sustainable Development identified "government-induced error" as a barrier to effective enforcement of federal legislation. The Committee explained:

A further barrier to the effective enforcement of the federal legislation occurs when authorizations or permits granted by another level of government conflict with the federal environmental legislation. These permits or authorizations might allow the release of pollutants into the environment in amounts that would constitute an offence under a federal law or regulation. Offenders, however, are not always prosecuted in such cases because, by reason of the permit or authorization, they can raise the defence of "government-induced error." Since the chances of obtaining a conviction in such cases are questionable, charges may not be laid in the first place, or if they are laid, they may not be proceeded with, or again, they may result in acquittal.¹⁵⁷

The House of Commons Standing Committee recommended that Environment Canada take steps to make the regulated community aware of its obligations under federal laws. Regarding the defense of officially-induced error, the courts have held that whether this defense will be successful depends on a consideration of all the factors that must be proved, including that the defendant was duly diligent by making appropriate inquiries.¹⁵⁸

"Abuse of process" can be invoked by a defendant in cases where entering a conviction would be unconscionable, risking bringing the administration of justice into disrepute. This would be the case, for example, if a person were charged with an offense after having been assured that no enforcement action would be taken, or after having

157. Canada, "Enforcing Canada's Pollution Laws: The Public Interest Must Come First!" (Report of the Standing Committee of the House of Commons on Environment and Sustainable Development, Charles Caccia, Chair) (Ottawa: Queen's Printer, 1998) at paras. 72-3.

158. See *R. v. Northwest Territories (Commissioner)* (1994), 15 C.E.L.R. (N.S.) 85 (N.W.T.S.C.), where the Town of Iqaluit was unsuccessful in arguing that its license under the *Northern Inland Waters Act*, which authorized it to "use waters," covered sewer discharges, since it was discharging sewage to waters not covered by the license and in any event, nothing in the license exempted the town from complying with the *Fisheries Act*.

agreed on a plan of remedial action and a timetable with the regulator and having implemented the plan in accordance with the timetable.¹⁵⁹ This excuse is also only available in the clearest of cases, and past non-enforcement alone may not be enough, absent an express or implied promise not to prosecute, to make this defense available. The Supreme Court of Canada has stated that to amount to one of the clearest of cases, there must be “overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.”¹⁶⁰

5.3 Forest Management Context in Ontario

In its response to the Ontario Logging submission, Canada states:

In their model, submitters refer to the Forest Management Plans (FMPs), which are operational units developed on provincial Crown land. The province of Ontario has the authority to grant Forest Resource Licenses under the *Crown Forest Sustainability Act* (CFSA). These licenses require forest products companies to protect the environment and pay the full cost of reforestation on the lands they cut. All FMPs follow provincial guidelines and CWS is aware that the provincial guidelines include biodiversity components. Input by federal agencies to the development of FMPs is invited as part of public consultations. Approval of a provincial FMP does not absolve companies of their responsibilities towards the federal MBCA.¹⁶¹

In developing the factual record, the Secretariat gathered information relevant to considering whether and how migratory bird nests are protected within Ontario’s forest management system.¹⁶² This information is relevant to considering the contribution of this system toward helping companies meet their responsibilities toward the federal MBCA, and in particular, their obligation to comply with s. 6(a) of the MBR.

In Ontario, laws and policies regulating logging have changed over time, reflecting trends in society’s demands on, and understanding of, the forest.¹⁶³ Historically, forests on the territory that is now Ontario were used by humans to meet subsistence needs.¹⁶⁴ From the late eigh-

159. *Re Abitibi Paper Co. and the Queen* (1979), 47 C.C.C. (2d) 487 (Ont. C.A.).

160. *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1 at para. 12.

161. Response at 5.

162. See ss. 4 (ii)-(iv) of the Request for Information (Appendix 3).

163. See “History of Forest Practices in Canada,” online: Canadian Institute of Forestry <<http://www.cif-ifc.org/english/e-practices-history.shtml>> (date accessed: 7 July 2005).

164. *Ibid.*

teenth- through the first half of the twentieth century, waves of immigrants to the region cleared forests to make way for larger settlements and commercial agriculture, and initiated large-scale timber felling and processing operations that would become a major driver in the provincial economy and provide employment in many communities.¹⁶⁵ In the years after the Second World War, faced with a contracting wood supply, industry and government espoused tree planting as a way of guaranteeing a sustainable yield of fiber from the forest.¹⁶⁶ By the last quarter of the twentieth century, there was increasing awareness that human activities were taking a heavy toll on nature, and that this, in turn, could have serious consequences for human wellbeing.¹⁶⁷

In 1975, Ontario passed its *Environmental Assessment Act*, the first of its kind in Canada.¹⁶⁸ The purpose of that act is the “betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.”¹⁶⁹ Two decades later, in 1994, Ontario’s Environmental Assessment Board approved – with 115 terms and conditions – a class environmental assessment (Class EA)¹⁷⁰ for forestry (the Timber Class

165. *Ibid.*

166. MNR, *Forest Resource Assessment Policy (Version 2)* (Ontario: Queen’s Printer, 2003) at 31: “From 1972 to 1994, the *Crown Timber Act* (R.S.O. 1990) and the *Forest Production Policy* (MNR 1972) provided for a sustained yield of timber from managed Crown forest lands in Ontario. The *Forest Production Policy* provided a framework for both the planning and management of Ontario’s Crown forest lands and resources; contained forecasts of future timber demand, timber harvest availability, forest renewal requirements and forest management funding; and defined a provincial production target for timber of 9.1 million cunits (25.8 million cubic metres) of wood annually by the year 2020.”

167. See David Estrin & John Swaigen, eds., *Environment on Trial – A Guide to Ontario Environmental Law & Policy*, 3rd ed. (Toronto: Emond Montgomery, 1993) at xxvi. See also Steve Thompson, ed., “Harvesting Methods in Canada’s Forests: A Discussion Paper from the National Round Table on the Environment and the Economy” (Ottawa: National Round Table on the Environment and the Economy, 1994).

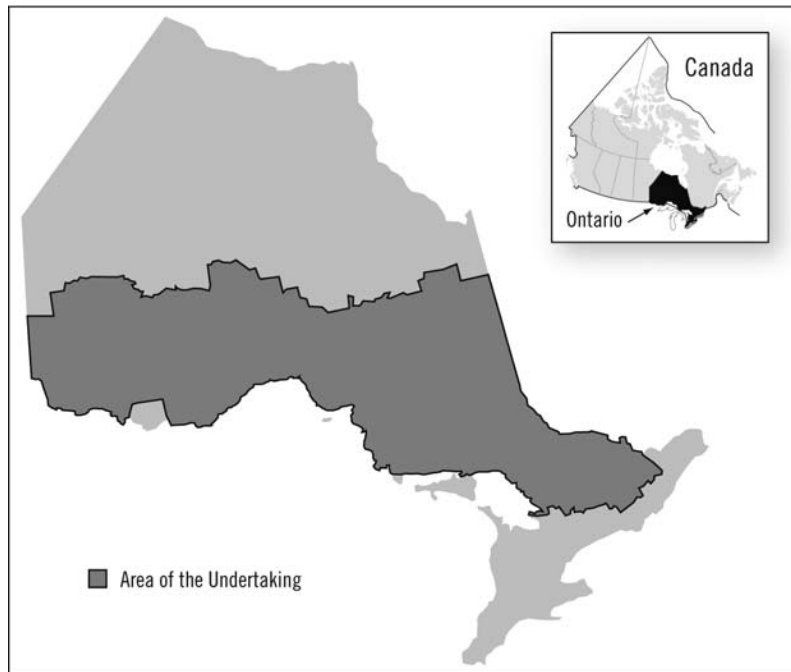
168. R.S.O. 1990, c. E-18; online: Government of Ontario / e-Laws <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90e18_e.htm> (date accessed: 7 July 2005). See also Cumulative Effects History in Canada; online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/013/0001/0004/c_e.htm> (last updated: 7 October 2003).

169. S. 2 of the *Environmental Assessment Act*.

170. S. 13 of the *Environmental Assessment Act* provides that “[a] person may apply to the Minister to approve a class environmental assessment with respect to a class of undertakings” and s. 1 of that act specifies that a class may be defined with respect to an attribute, quality or characteristic or combination thereof; it may be defined to include or exclude one or more members that would otherwise not be included in or excluded from the class; and it may be defined to consist of a specified person, thing, matter or activity.

EA) tabled with the Board by Ontario's Ministry of Natural Resources (MNR) for an area covering roughly 45% of the province's landbase (the "Area of the Undertaking" or "AOU").¹⁷¹ As the proponent, MNR defined the purpose of the undertaking¹⁷² for which it was seeking approval as follows: "The purpose of the undertaking is to provide a continuous and predictable supply of wood for Ontario's forest products industry."¹⁷³

Figure 1. The Area of the Undertaking (AOU)¹⁷⁴



171. See online: MNR <<http://ontariosforests.mnr.gov.on.ca/timbereaoverview.cfm>> (date accessed: 7 July 2005).

172. MNR defined the undertaking as: "timber management planning, comprising the interrelated activities of access, harvest, renewal, maintenance and their planning, on Crown lands on which timber management activities are carried out, on forest management units, in the area of the undertaking;" Ontario Environment Assessment Board, "Timber Class EA Reasons for Decision and Decision – Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario EA-87-02" (20 April 1994) [hereinafter "Timber Class EA Reasons for Decision and Decision"] at 423.

173. *Ibid.* at 53.

174. MNR, *Forest Resource Assessment Policy (Version 2)* (Ontario: Queen's Printer, 2003) at 11.

In 1994, the Timber Class EA expanded the list of elements to be considered in forest management planning within the AOU beyond the economic requirement of “sustainable yield” to include social and environmental considerations.¹⁷⁵ Also in 1994, the province passed a new forestry law, the *Crown Forest Sustainability Act, 1994* (CFSA),¹⁷⁶ and since then, CFSA implementation manuals have been issued and revised by MNR to take into account the terms and conditions of the Timber Class EA, which cover all aspects of forestry: access, harvest, renewal, maintenance, and their planning.¹⁷⁷ Under the CFSA, forest management plans or “FMPs” can only be approved if they are “sustainable,” and making this determination involves considering economic, social and environmental issues associated with logging.¹⁷⁸ Under the Act, concepts used to assess environmental sustainability have built-in economic and social considerations.¹⁷⁹

175. *Ibid.*

176. S.O. 1994, c. 25; online: Government of Ontario / e-Laws <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/94c25_e.htm> (date accessed: 7 July 2005).

177. The four regulated manuals are the *Forest Management Planning Manual* (1996) [hereinafter FMPM 1996] (replaced in 2004); *Forest Operations and Silviculture Manual*; *Forest Information Manual* (2001); *Scaling Manual*; see “Ontario’s Regulated Manuals;” online: MNR <<http://ontariosforests.mnr.gov.on.ca/regulatedmanuals.cfm>> (date accessed: 7 July 2005).

178. S. 9(2) of the CFSA: “The Minister [of Natural Resources] shall not approve a forest management plan unless the Minister is satisfied that the plan provides for the sustainability of the Crown forest, having regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the Crown forest.” See also MNR, “Forest Management Planning in Ontario;” online: MNR <<http://ontariosforests.mnr.gov.on.ca/fmpoverview.cfm>> (date accessed: 19 September 2005).

179. For e.g., s. 2 of the CFSA defines sustainability as “long term Crown forest health,” and s. 3 defines “forest health” as “condition of a forest ecosystem that sustains the ecosystem’s complexity while providing for the needs of the people of Ontario.” In the *Forest Management Guide for Natural Disturbance Pattern Emulation* (Version 3.1, November 2001), under “Forest Composition,” the Guide states, at 7: “Forest composition objectives, set for individual forest management units, must be moving towards the estimated natural forest condition (standard), while considering natural variation (see discussion of Benchmarks and Bounds of Natural Variation).” Under “Bounds of Natural Variation,” the Guide states, at 8: “Natural variation for major forest parameters (e.g. forest composition, age class distribution or landscape pattern) will be estimated using methods like long-term simulation (e.g. Strategic Forest Management Model; OnFire II). Acceptable bounds are those that best reflect the uncertainty around the estimated natural forest condition, tempered by exceptional ecological, social and cultural constraints (standard). The acceptable bounds are determined in the forest management planning process considering the ecoregional context. The selected management alternative will create the desired forest condition within acceptable bounds and within an acceptable time period (standard).”

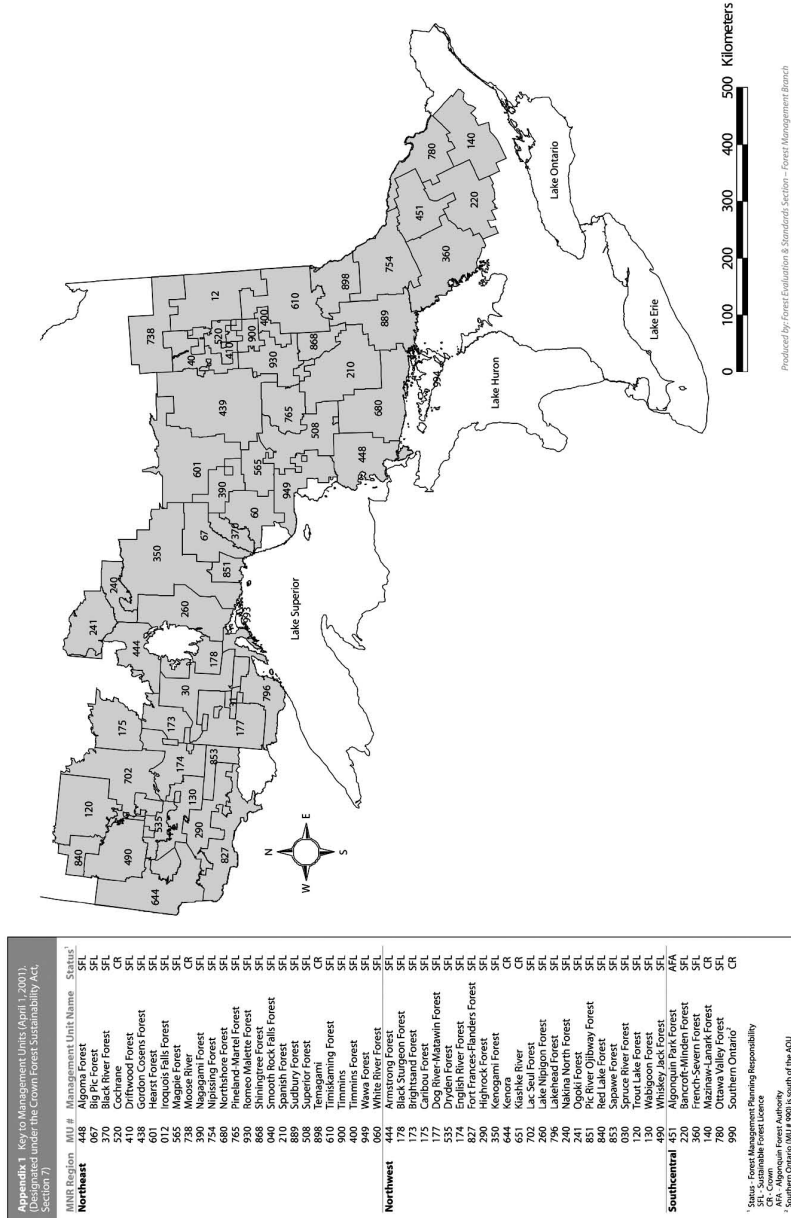
The AOU covers an area of 43.2 million hectares¹⁸⁰ and is divided up into roughly fifty forest management units (FMUs),¹⁸¹ with logging rights on most of these administrative units allocated to forestry companies under “sustainable forest licenses” (SFLs) issued by MNR.¹⁸²

180. Ontario, *State of the Forest Report (2001)* (Ontario: Queen’s Printer, 2002) at i-10.

181. See Environmental Commissioner of Ontario, *2004/2005 Annual Report Supplement* (Ontario: Queen’s Printer, 2005) at 194: “The number of Forest Management Units has been reduced as per the Transition Team’s recommendations from 81 in 1996 to 48 as of April 1, 2004.”

182. S. 7 and Part III of the CFSA, and MNR, *Annual Report on Forest Management 2001/2002* (Ontario: Queen’s Printer, 2004) at Appendix 1. See also s. 24(1) of the CFSA: “If the Minister is of the opinion that forest resources in a management unit should be made available to be harvested or to be used for a designated purpose, the Minister shall give public notice in such manner as he or she considers appropriate of the intention to make the resources available.”

Figure 2. FMUs in the AOU (April, 2001)¹⁸³



183. MNR, *Annual Report on Forest Management 2001/2002* (Ontario: Queen's Printer, 2004) at 104-105.

Provincial government land use planners consider the AOU as a whole when deciding on the location and size of reserves like parks and protected areas.¹⁸⁴ Planning outside of parks and protected areas, within the AOU, is done mainly at the FMU level, one FMU at a time, in forest management plans prepared on the basis of provincial manuals and guides, by contractors working for SFL holders, with input from provincial government employees and local citizens' committees.¹⁸⁵ Thus, for each FMU, forest management planning includes such things as road planning,¹⁸⁶ planning logging operations so as to maintain a mix of forest habitats within the FMU over time,¹⁸⁷ deciding on logging

184. See Ontario's Living Legacy; online: MNR <<http://www.ontarioslivinglegacy.com/>> (date accessed: 8 July 2005). See also Lands for Life Process, Ontario; National Round Table on the Environment and the Economy <http://www.nrtee-trnee.ca/eng/programs/Current_Programs/Nature/Case-Studies/Lands-for-Life-Case-Study-Complete_e.htm> (date accessed: 8 July 2005).
185. During forest management planning, planners are also required to take into account district land use guidelines developed for some areas of the province in the early 1980's; see the Crown Land Use Policy Atlas, online: MNR <<http://crownlanduseatlas.mnr.gov.on.ca/>>. But see Timber Class EA Reasons for Decision and Decision at 383: "From the material presented by the various parties, we accept that DLUGs (district land use guidelines) are only guidelines, and are not binding land use decisions. DLUGs have no legal status. Some districts do not have DLUGs. They are not mandatory. They have not been subject to an environmental assessment. We further accept that they do, however, represent government policy direction, are made at a higher level of planning than the management unit and are made in a broader context than timber management planning." See also Ontario, *Forest Management Guide for Natural Disturbance Pattern Emulation* (Version 3.1, November 2001) (Ontario: Queen's Printer, 2002); online: MNR <http://www.mnr.gov.on.ca/mnr/forests/forestdoc/ebr/guide/natural_dist/part%20one.pdf> (date accessed: 7 July 2005) at 28: "Landscape – Complexes of terrestrial ecosystems in geographically defined areas. The forest management unit is the geographically defined area for the purpose of the Natural Disturbance Pattern Guide." See also Sierra Club of Canada, "Integrated Land-Use Planning and Canada's New National Forest Strategy – Part 2: Case Studies: A: Ontario: Lands for Life" (July 2004); online: Sierra Club of Canada <<http://www.sierraclub.ca/national/programs/biodiversity/forests/nfs/index.shtml>> (date accessed: 14 July 2005); and Ontario, *State of the Forest Report (2001)* (Ontario: Queen's Printer, 2002) at 4-53: "The EA Decision requires that the forest ecosystem classifications be used to develop silvicultural ground rules (T&C 25b) and that MNR continue improving the forest ecosystem classification system (T&C 97). [...] Efforts to incorporate the ELC (Ecological Land Classification) into natural resource policy and planning tools, such as the provincial silvicultural guides, the Old Growth Conservation Strategy, wildlife habitat guidelines, wood supply models, natural heritage conservation objectives, and related practices and guidelines, are continuing."
186. See FMPM 1996 at A-80, A-121. See also MNR, *Forest Roads and Water Crossings Initiative – Task Team Report* (Ontario: Queen's Printer, 2003); online: MNR <<http://ontariosforests.mnr.gov.on.ca/publications.cfm#strategic>> (date accessed: 8 July 2005).
187. FMPM 1996 at A-61.

intensity and methods (including determining the size and number of clearcuts)¹⁸⁸ and “area of concern” (AOC) planning to leave tree buffers in some places to protect a range of “values” (such as viewsheds for tourism, fish habitat, and raptor nests).¹⁸⁹

Figure 3. A streamside AOC. Note the buffer of unharvested timber between the stream and cutover area.¹⁹⁰



5.3.1 *Providing direction in policy*

As regards land use planning at the FMU level, with MOE’s approval of the Timber Class EA in 1994, certain issues were considered to be “settled.”¹⁹¹ In its Reasons for Decision, Ontario’s Environmental Assessment Board explained:

In this chapter, we have tried to distinguish between those issues that are settled by this approval and those which are to be decided through the planning process established under the approval. These questions have

188. *Ibid.* at A-92-3.

189. *Ibid.* at A-87.

190. ArborVitae Environmental Services Ltd., “Nipissing Forest Independent Forest Audit – 1996-2001 Final Report” (prepared for MNR) (30 April 2001) at 28.

191. Timber Class EA Reasons for Decision and Decision at 70.

been dealt with as they arose, especially in the different “Findings” sections under the headings “The Concept of a Class Environmental Assessment” and “The Acceptability of the Class EA.”

To summarize, based on the facts as we have found them, the following issues will be settled:

1. The class environmental assessment is acceptable and MNR can proceed with its timber management planning undertaking subject to the conditions of approval.
2. The purpose of the timber management planning undertaking is “to provide a continuous and predictable supply of wood for Ontario’s forest products industry” and it has been accepted.
3. We have accepted that MNR has demonstrated the need for the timber management planning undertaking and why it is the preferred choice among the alternatives analyzed. This means that timber management planning can be conducted throughout the area of the undertaking without establishing the need to supply timber for each 5-year Plan in each of the 90 management units.
4. None of the above issues is open for debate at the management unit level.¹⁹²

192. Timber Class EA Reasons for Decision and Decision at 70. “Not all of the parties agreed, however, that MNR’s case adequately demonstrated the need for the undertaking at the local or management unit level. It was submitted that while the need for a provincial program of timber management planning is clear, each management unit planning team must ask itself at the outset of developing that unit’s five-year plan, whether the undertaking should be pursued. It is clear on the evidence that timber management planning and the purposes of this undertaking are bound to the participation by all management units in the area of the undertaking. There is no possible way in which management units can operate while ignoring the purpose of the undertaking. These units are geographically distinct administrative jurisdictions for management purposes. They are not so distinct, however, that their participation in timber management planning can be subject to re-assessing the fundamental question of their participation. MNR presented sufficient evidence of the need to require all management units to contribute to the provincial goal. For instance, wood supply shortages in one management unit can and are addressed by supply from others; management of regeneration, access and maintenance activity in adjoining management units is often inter-connected; co-ordination and planning of non-timber values are also similarly related between and among management units. Therefore, we believe that MNR is not required to demonstrate need in the case of each unit’s five-year Plan. We believe that proven need for the undertaking demonstrates need for the participation of each unit. MNR persuaded us that the need to supply timber to the forest industry is motivated by compelling economic and social grounds. [...] The evidence before us persuades us of the need for the undertaking.” *Ibid.* at 58.

Consequently, during forest management planning at the FMU level, a local citizens' committee or other stakeholders cannot advance a blanket "no logging in the FMU" option, to, for example, protect remote wilderness or promote remote tourism, because that would be inconsistent with the purpose of the undertaking.¹⁹³ While there is no binding regional, provincial or national land use direction¹⁹⁴ for maintaining the amount and distribution of flora and fauna across their natural ranges (including outside of parks and protected areas), programs and tools for tracking amount and distribution of flora and fauna have been developed and used for scientific and reporting purposes,¹⁹⁵ and efforts are being made to make research results available for use by local planners, principally in southern Ontario.¹⁹⁶

193. *Ibid.* at 69: "We agree with MNR that land use planning processes provide decisions which designate permitted land uses. The timber management planning process does not do this. For instance, the timber management planning process does not decide where a park goes nor where a wilderness area can be sited." See also MNR, "Ontario's Approach to Wilderness: A Policy / May 1997 (Version 1.0)," online: MNR <http://www.mnr.gov.on.ca/mnr/forests/public/publications/wilderness_policy.pdf> (date accessed: 3 November 2005) at 5.2.
194. Land use direction: "Specific direction on the use of land that arises out of: Legislation, government direction; approved policy; and land use and resource management plans;" Ontario Crown Land Use Policy Atlas, Glossary, online: Ontario Crown Land Use Atlas <<http://crownlanduseatlas.mnr.gov.on.ca/glossary.html>> (date accessed: 19 September 2005). See also Canadian Integrated Landscape Management Coalition, "Integrated Landscape Management – Applying Sustainable Development to Land Use" (May 2005), online: Canadian Biodiversity Information Network <<http://www.cbin.ec.gc.ca/primers/landscape.cfm?lang=e>> (date accessed: 5 December 2005) and National Round Table on the Environment and the Economy, "Boreal Futures: Governance, Conservation and Development in Canada's Boreal" (October 2005) at s. 3.3 "Planning and Regulatory Processes," online: National Round Table on the Environment and the Economy <http://www.nrteetnee.ca/eng/programs/Current_Programs/Nature/Boreal-Forest/Documents/Boreal-Futures/Boreal-Futures_3-3-Governance_E.htm> (date accessed: 8 December 2005).
195. See e.g. I.B. Marshall & P.H. Shut, *A National Ecological Framework for Canada* (Ottawa: Environment Canada & Agriculture & Agri-Food Canada, 1999), online: Agriculture and Agri-Food Canada <<http://sis.agr.gc.ca/cansis/nsdb/ecostrat/intro.html#overview>> (date accessed: 6 July 2005). See also Canadian Forest Service, MNR & International Union of Forest Research Organizations Working Group, *Global to Local: Ecological Land Classification* (Conference and workshop held 15-17 August 1994 in Thunder Bay, Ontario, Canada), online: Finnish Forest Research Institute <<http://www.metla.fi/archive/forest/1994/07/msg00043.html>> (date accessed: 15 November 2005) and CWS, Ontario Region, Project Wildspace, online: Environment Canada <<http://wildspace.ec.gc.ca/intro-e.html>> (date accessed: 14 July 2005).
196. See Ontario's Natural Heritage Information Centre, online: MNR <http://nhic.mnr.gov.on.ca/nhic_.cfm> (date accessed: 20 September 2005) and MNR, *Significant Wildlife Habitat Technical Guide* (Ontario: Queen's Printer, 2000), online: MNR

As regards protection of flora and fauna on the portion of the landscape within the AOU where logging may take place (roughly 70%¹⁹⁷), Ontario forest policy requires the forest industry to minimize short term¹⁹⁸ and long term¹⁹⁹ biodiversity impacts associated with logging.²⁰⁰ As regards wildlife:

MNR's policy is to ensure that no species declines on a provincial scale because of forest management activities.²⁰¹

5.3.2 *Setting objectives through planning*

There is uncertainty regarding whether any wildlife species is declining on a provincial scale in Ontario because of logging,²⁰² because

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- <<http://www.mnr.gov.on.ca/MNR/pubs/SWHTG.PDF>> (date accessed: 21 September 2005). See also Andrew Couturier, "Lists of Priority Bird Species: A Conservation Tool for Municipal Planning – A Case Study in the Escarpment Region," online: Niagara Escarpment Commission <http://www.escarpment.org/leading_edge/LE99/le99_s2/Couturier.pdf> (date accessed: 11 July 2005); CWS, *How Much Habitat is Enough? – Forest Habitat Guidelines* (Great Lakes Fact Sheet), online: CWS (Ontario Region) <http://www.on.ec.gc.ca/wildlife/factsheets/fs_habitat-e.html#forest> (date accessed: 15 November 2005); and National Land and Water Information Service, online: Agriculture and Agri-Food Canada <http://www.agr.gc.ca/nlwis/index_e.php> (date accessed: 8 December 2005).
197. This is the portion of a planning area encompassing the AOU and several provincial parks that is zoned "General Use Areas." See MNR, "Ontario's Living Legacy Land Use Strategy" (Ontario: Queen's Printer, 1999) at 25: "About 70 percent of the planning area has been placed in a general use designation. This designation includes all Crown lands not placed into a specific designation or EMA (Enhanced Management Area). A full range of resource and recreational uses can occur in General Use Areas. Management of General Use Areas will occur in the context of maintaining ecological sustainability. There is an extensive set of legislation, policy and guidelines that will support and direct management actions in General Use Areas. In the short term, further planning in General Use Areas will primarily occur through the forest management planning process."
198. Ontario, "Policy Framework for Sustainable Forests" (6 April 1994), s. 3.1 "Principles for Sustaining Forests: [...]" – Forest practices must minimize adverse effects on soil, water, remaining vegetation, fish and wildlife habitat, and other values."
199. *Ibid.* "– Maintaining ecological processes is essential for the functioning of the biosphere, and biological diversity must be conserved in the use of forest ecosystems."
200. MNR's overall mission, as it relates to sustainable development, is set out in its *Statement of Environmental Values* and its *Beyond 2000* policy statement, online: MOE <http://www.ene.gov.on.ca/envision/env_reg/ebr/english/SEVs/mnr.htm> (date accessed: 14 July 2005) and MNR <<http://www.mnr.gov.on.ca/mnr/beyond2000/beyond2000.pdf>> (date accessed: 14 July 2005).
201. MNR, *Forest Operations and Silviculture Manual*, 1st ed. (Ontario: Queen's Printer, 1995) at 14.
202. Ontario, *State of the Forest Report (2001)* (Ontario: Queen's Printer, 2002) at 3-54: "Wildlife population monitoring programs do not yet cover the entire province,

of limits in available data regarding – and understanding of – wildlife in Ontario’s forests²⁰³ and a lack of information on how different logging practices – and guidelines for wildlife protection during logging – have affected and will affect species in the forest,²⁰⁴ as well as recognition that

and changes in monitored wildlife populations due to forest management practices cannot be detected. Therefore conclusions about monitored forest-based wildlife population concerns and trends at a provincial scale are not yet possible.” See also Sierra Club of Canada, “The State of Ontario’s Forests – A Cause for Concern” (2002), online: Sierra Club of Canada <<http://www.sierraclub.ca/national/programs/biodiversity/forests/state-of-the-forests/scc-ontario-forests.pdf>> (date accessed: 8 December 2005).

203. See e.g. Ontario, *State of the Forest Report (2001)* (Ontario: Queen’s Printer, 2002) at 3-160: “The Wildlife Assessment Program (WAP) was established in 1995, as mandated by EA Decision Condition 81, to monitor wildlife within the AOU. The overall goal of the WAP is to identify and assess population trends of selected Ontario wildlife species that may be affected by forest management practices, and to help explain why wildlife populations may be changing. A total of 92 species were originally selected to be the focus of the monitoring program. Of these, 85 were recommended by experts at a workshop as being direct indicators of sustainable forest management. These species operate at a variety of scales (landscape, forest, stand) and trophic or energy levels (there are carnivores, insectivores, herbivores, and omnivores within the group). The remaining species were added by MNR because they are species of high management and conservation interest or are considered symbols of wilderness by the public. Collectively, these 92 species represent all of the categories of species designated for monitoring by EA Decision Condition 81. To date the monitoring framework originally envisioned during the expert workshop and by the WAP has not been fully implemented.”
204. Condition 85 of the Timber Class EA stated: “MNR shall undertake interdisciplinary internal operational audits with respect to compliance with the timber management planning process, approved Timber Management Plans, implementation manuals, and relevant provincial policies, obligations, procedures and legislation. The audit shall include an assessment of the availability of inventory information with respect to timber and non-timber values for the forest management unit for use in timber management planning, with recommendations concerning any data collection priorities that should be addressed. In addition, audits shall assess the effectiveness of timber management activities in achieving timber management objectives and in providing assistance in meeting non-timber objectives.” ArborVitae Environmental Services Ltd. *et al.*, “Review of Forest Management Guides; Submitted to The Provincial Forest Technical Committee (Ontario)” (31 May 2000) [hereinafter *2000 Report on Guidelines Review*] at 83: “The Class EA Report also separated effects/effectiveness monitoring from silvicultural monitoring. The authors stated that the former ‘type of monitoring is aimed at assessing the effect of timber management operations and the effectiveness of timber management prescriptions and practices on protecting non-timber values’ (MOE 1994 p. 281). In contrast, the latter was defined as follows: ‘monitoring of silvicultural effectiveness involves collecting and analyzing information and reporting on the progress achieved in regenerating the forest’ (MOE 1994, p. 281). [...] In contrast to silvicultural monitoring, one of the major observations we made during this study is that the level of effects and effectiveness monitoring is inadequate. [...] The foregoing overview of the effects/effectiveness monitoring in Ontario suggests that

results from research carried on elsewhere may have limited application in Ontario.²⁰⁵

To address uncertainty regarding the effects of logging on biodiversity, it has been suggested that the traditional land use planning paradigm – whereunder the land base is divided into resource management units dotted with islands of protected areas – be abandoned in favour of a “reverse-matrix” approach that considers the land base as a whole as a supportive ecological framework within which pockets of resource development activities are allowed to be carried on, with active experimentation and close monitoring to better understand the effects of resource development on the ecosystem and a process for improving management techniques through ongoing incorporation of research

we have very little sound knowledge about the impacts of many guidelines. Our only conclusion here is that, with few exceptions, we do not have enough information to provide a basis for assessing the extent to which values are protected by guidelines;” and 84: “During the course of the EA hearings, MNR stated that approximately \$10 million per year would be needed to fund provincial effects/effectiveness monitoring studies (MOE 1994, p. 307). To date, MNR has conducted work regarding the effectiveness of moose and fish habitat guidelines (at a cost of about \$600,000/yr (J. Churcher pers. comm.), not including staff time) and has done some limited monitoring of the tourism guidelines. Monitoring the caribou guidelines has recently begun, and an effort to begin monitoring of the marten guidelines is underway. In addition to these efforts, some MNR staff, primarily at the South Central Science and Technology Unit, have conducted insightfully-designed smaller-scale and primarily retrospective analyses in attempts to determine the effectiveness of some of the environmental manuals. In sum, however, MNR’s spending on effects and effectiveness monitoring has not approached \$10 million per year in any year since the EA report was released.” See also Peter J. McNamee *et al.*, *Background Report to Timber Management Guidelines Effects Monitoring Workshop, April 6-10, 1987* (Reference No. 3) (Toronto: ESSA Environmental and Social Systems Analysts Ltd., 1987); Peter J. McNamee *et al.*, *Effects Monitoring for Resource Protection Guidelines in Ontario* (Reference No. 4) (Toronto: ESSA Environmental and Social Systems Analysts Ltd., 1988); and Lorne A. Greig *et al.*, *An Investigation into the Effects of Timber Management on Wildlife* (Richmond Hill: ESSA Environmental and Social Systems Analysts Ltd., 1991).

205. See National Council for Air and Stream Improvement, *Bird-Forestry Relationships in Canada: Literature Review and Synthesis of Management Recommendations*, Technical Bulletin No. 892 (December 2004), 4.0 “Management Recommendations,” at 61-2: “Welsh (1987) cautioned that patterns of succession and related habitat structure, and bird habitat preferences and requirements may change from ‘place to place.’ Just because a species is associated with a specific habitat in one location, it is not necessarily the same elsewhere. This emphasizes the importance of site-specific knowledge when developing management strategies for bird conservation. Where possible, forest managers should obtain or collect localized information on bird-habitat associations prior to developing management strategies. This can best be accomplished through research and monitoring programs in partnership with industry, government, and non-government agencies.”

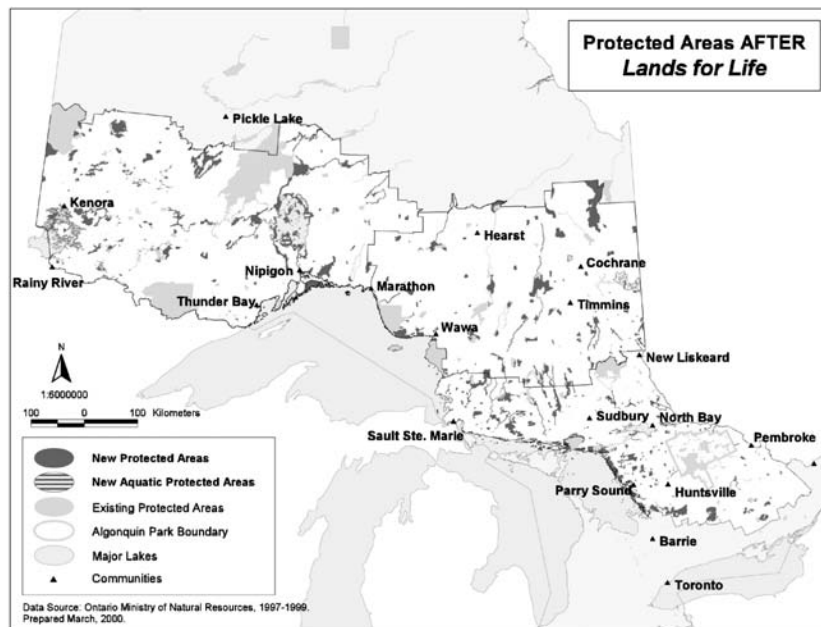
results.²⁰⁶ A related approach, the “triad approach,” suggests dividing the land base into three types of areas, each with its own level of resource development intensity: zero, low, and high, with management in the low intensity zone being focused on biodiversity conservation.²⁰⁷

Since most of the provincial Crown land within the AOU has already been allocated to forestry companies for logging, it is difficult to implement ecological planning approaches such as the reverse-matrix approach or the triad approach, since that could mean revoking or amending logging licenses issued under the CFSA. However, a regional planning exercise begun in 1997 for an area of 45 million hectares encompassing the AOU resulted in an agreement by the forest industry, environmental groups and the Government of Ontario, that the portion of the land base within this planning area²⁰⁸ set aside as parks and pro-

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206. F.K.A. Schmiegelow *et al.*, “Conservation Beyond Crisis Management: A Reverse-Matrix Model” (unpublished, 2005). Abstract: “In many regions of the world, failure to plan effectively for conservation of biological diversity has led to irretrievable losses of ecosystem structure and function or, at least, a need for expensive and risky restoration efforts. In relatively intact systems, planning pro-actively for biological conservation requires a systems approach that integrates the fields of conservation biology and resource management. We evaluate current conservation paradigms and describe an alternative, reverse-matrix model for regional conservation that exploits the strengths of systematic conservation planning and adaptive resource management. We explore application of this model for boreal regions of Canada, where opportunities for large-scale conservation are virtually unparalleled.” See also *The State of Canada’s Forests – 2004/2005; Benefits of the Boreal Forest*, online: Natural Resources Canada <http://www.nrcan-rncan.gc.ca/cfs-scf/national/what-quoi/sof/sof05/feature03_e.html> (date accessed: 15 November 2005); Klaus Hubacek and Jose Vazquez, “The Economics of Land Use Change” (Austria: International Institute for Applied Systems Analysis Interim Report IR-02-015, 2002); and Forest Products Association of Canada, Prospectors and Developers Association of Canada, Wildlife Habitat Canada, Parks Canada, and Environment Canada, “Report on the National Landscape Management Workshop” (Aylmer, Quebec, 23-25 April 2003).
207. Dr. Christian Messier, Professor of Forest Ecology, University of Quebec and Researcher, Sustainable Forest Management Network, *The Triad Approach to Forest Management* (interview), online: Innovation Alberta <<http://www.innovationberta.com/article.php?articleid=196>> (date accessed: 15 November 2005).
208. Ontario’s Living Legacy Planning Area: “A planning area occupying most of Central Ontario, where Crown land ownership predominates and where active resource management was taking place. The planning area excluded the south where only pockets of Crown land exist, Manitoulin Island and far north – generally north of the 51st parallel. This planning area consists of 45 million hectares, and generally covers an area similar to that addressed in the Class Environmental Assessment for Timber Management for Crown Lands in Ontario,” Ontario Crown Land Use Policy Atlas, Glossary; online: Ontario Crown Land Use Atlas <<http://crownlanduseatlas.mnr.gov.on.ca/glossary.html>> (date accessed: 19 September 2005).

ected areas would increase to 12% without the logging industry thereby facing higher costs or a long-term reduction in wood supply.²⁰⁹

Figure 4. Protected areas within and around the AOU



Maintenance of wood supply for the logging industry would be achieved in part by creating a land use designation allowing for intensive forestry (where trees are planted, tended and harvested like crops²¹⁰), and costs to industry would be kept in check through a commitment by the Ontario Government to compensate forest companies for lost capital investments (e.g. mill closures) resulting from permanent land withdrawals.²¹¹ In addition, MNR agreed to help develop a process

209. See *Ontario Forest Accord* (March 1999), online: MNR <<http://www.mnr.gov.on.ca/MNR/oll/ofaab/accord.html>> (date accessed: 16 September 2005).

210. See Ben Cashore, "The Policies and Politics Governing Plantation Management" (2004), online: Yale School of Forestry and Environmental Studies <http://www.yale.edu/forestcertification/pdfs/2004/04_presentation_jan22.pdf> (date accessed: 14 December 2005).

211. See arts. 14-17 and 19 of the *Ontario Forest Accord*. Art. 19: "MNR will implement compensation for capital investments for permanent infrastructure and processing assets directly related to regulated land withdrawals as a result of the Lands for Life process and any future unilateral withdrawals. Compensation issues will only be

for sharing future permanent increases in wood supply between additional protected areas and increased fiber for the forest industry.²¹²

In 1997, at the outset of this planning process, MNR made clear:

One of the most important givens when the Lands for Life process began was that current policy related to Crown land and natural resources management was to remain intact. The clear intent was to have the public, and the Round Tables, concentrate on making planning recommendations, and not to have the planning process become a vehicle to re-write government policy.²¹³

Thus, to be consistent with the purpose of the undertaking as defined in the Timber Class EA, the potential reduction in wood supply resulting from the increase in the amount of land officially set aside as protected areas was to be counterbalanced by allowing for intensive forest management on an equivalent portion of the land base.²¹⁴ It has been said that the result was an application of the triad approach.²¹⁵ Thereafter,

considered after all mitigation and transition strategies have been exhausted. [...]”
The amount of compensation, if any, determined shall be defined in the sequence as follows:

- Notification to the affected party of the withdrawal of regulated areas from the SFL.
- Mitigation and transition strategies developed by MNR and the affected companies, resulting in a written report to the party.
- Notification by the affected party to the Deputy Minister that a capital investment loss remains unmitigated.
- Evaluation and validation of the party(ies) claim by a qualified, independent, mutually agreed-upon expert resulting in a detailed report to the Deputy Minister.
- The Deputy Minister responds as to the actions or compensations deemed reasonable and appropriate in light of the report.
- Failing agreement to the Deputy Minister’s response, the issue will be referred to arbitration for recommendations to the Minister, whose decision is final.
- The Minister will accept reasonable requests for compensation recommended by the arbitrator.
- None of the above infringes upon the rights of the affected party to seek a civil remedy in the courts.”

212. Art. 7 of the *Ontario Forest Accord*.

213. MNR, *The Evolution of Ontario’s Living Legacy* (Ontario: Queen’s Printer, 2001) at 5.

214. See also Environmental Commissioner of Ontario, *2004/2005 Annual Report Supplement* (Ontario: Queen’s Printer, 2005) at 182: “MNR has accepted the OFAAB’s (Ontario Forest Accord Advisory Board’s) March 2002 final report on ‘Room to Grow’ and will complete a detailed implementation plan for the Ontario Forest Accord commitments. The Room to Grow report not only benchmarks the industrial harvest levels and a sharing level for establishing new parks, but also describes a process for setting aside 12 per cent of the area of each forest management unit for intensive forest management.”

215. ArborVitae Environmental Services *et al.*, *A Case Study of Conservation in the Abitibi Region (Quebec-Ontario Border)* (Final Report) prepared for the National Round

consistent with Ontario policy, there remained the need to ensure that no species declined on a provincial scale as a result of forest management activities being carried out on the “intervening landscapes” within the AOU.

5.3.2.1 Planning for wildlife values within the forest management system

Condition 106 of the Timber Class EA required MNR, within three years of the 1994 approval, to develop a provincial policy on roadless wilderness areas.²¹⁶ In May 1997, MNR published “Ontario’s Approach

Table on the Environment and the Economy as part of its Conserving Natural Capital: The Boreal Forest Program (21 July 2004), online National Round Table on the Environment and the Economy <http://www.nrtee-trnee.ca/eng/programs/Current_Programs/Nature/Boreal-Forest/Documents/20040721-Abitibi-Case-Study/20040721-Abitibi-CS_E.pdf> (date accessed: 21 November 2005).

216. See Timber Class EA Reasons for Decision and Decision at 133-34: “Roadless Wilderness Areas”

“Forests for Tomorrow (FFT) proposes that MNR identify all the roadless areas in each forest management unit and manage these as wilderness. No primary or secondary roads would be permitted unless certain conditions are met (the road must not significantly affect biological diversity, water quality and non-timber values). All roads that are built would be revegetated within five years unless necessity and the rationale for a permanent road are set forth in the Plan. FFT argues that there is public support for roadless areas. It said people value wilderness recreation, solitude, maintenance of biodiversity and a range of other ecological, scientific and socio-economic benefits. Zane Smith, an official of the U.S. Forest Service who testified for FFT, said 17 percent of the U.S. National Forests is set aside under the terms of the 1964 *Wilderness Act*. Mr. Smith said those wilderness areas ‘are managed so that there is as little as practical human influence on them’ and provide ‘the opportunity for research in a basically unmanipulated landscape and vegetation’ (trans: vol: 298, p. 53098). Peggy Walsh Craig, a witness for Northwatch, spoke about how the wilderness provides her with immeasurable spiritual renewal and inspiration (Ex. 2179). Vicki Mather, a witness at the North Bay community hearing proposed that 5% to 10% of each FMU remain roadless. FFT submitted that the adverse impacts of forest roads can be avoided by keeping certain areas free of roads. FFT counsel also argued that requiring MNR to evaluate roadless areas will ensure that the environmental impacts of new access roads will be thoroughly and publicly assessed. Northwatch supported FFT’s roadless area proposals. FFT did not give us a workable definition of roadless areas. Are these synonymous with wilderness, ecological reserves or protected areas? Why should wilderness areas exclude ANSIs (areas of natural or scientific interest), provincial parks or an area designated under the *Wilderness Areas Act*? We observe on the map of the road network that there remain some large areas unaccessed in the northern and northwestern parts of the area of the undertaking. Is a roadless area the size of 1 hectare, 1 square kilometre or 100 square kilometres? How can decisions be made about setting aside wilderness areas without deciding their purpose? How can decisions about wilderness

to Wilderness: A Policy (Version 1.0),” which “confirms existing wilderness parks and zones,” “addresses the contribution of other parks and protected areas,” and “addresses the consideration of wilderness values through ongoing management activities on the intervening landscapes and waterscapes outside parks and protected areas.”²¹⁷ In respect of intervening landscapes and waterscapes, the policy states:

Wilderness characteristics are maintained through: [...] Operational planning and management tools and techniques. For example, some Forest Management Plans restrict access (called “Limited Access Areas”) to maintain the undeveloped and roadless nature of Crown land areas which exhibit wilderness characteristics, and some District Land Use Guidelines (DLUGs) designate “Remote Areas” within which access is limited.

Historically, MNR has developed, or sponsored development of, many programs that collectively contribute to the maintenance of wilderness values on the intervening landscapes and waterscapes. However, more work needs to be completed to assess their cumulative contribution.²¹⁸

areas be made separately within each forest management unit, in isolation from regional or provincial needs or objectives? Which activities would be compatible with the objectives of roadless wilderness areas – remote tourist operations, cottages, fire protection, insect management, hunting? We agree with FFT that wilderness preservation is an important objective, but in our opinion roadless wilderness areas are a matter of provincial interest comparable to the timber management decisions that need to be made about landscape management and biological diversity. Also, more information is needed. We are ordering Condition 106 requiring MNR to develop a provincial policy on roadless wilderness areas by 1997. Appendix 20 requires MNR to report progress on this issue annually to the Legislature.”

217. See Environmental Commissioner of Ontario, *1999 Annual Report (Supplement)* at S7-19: 199001: “Alleged failure by MNR to comply with Condition 106 of the Class EA for Timber Management (MOE),” online: Environmental Commissioner of Ontario <<http://www.eco.on.ca/english/publicat/ar1999su.pdf>> (date accessed: 29 November 2005).
218. The policy defines wilderness as “landscapes and waterscapes that are, or have the potential to be, self-sustaining, and where human interference is minimal. The wilderness condition of Ontario’s landscapes and waterscapes contributes to ecosystem health, science, education, and cultural and social values (e.g., recreation and personal wellbeing). Wilderness is notable for the relative absence of human impacts (e.g., the absence of roads) and the lack of long-lasting damage from human activities.” In 2003, in reporting on progress in the development of a landscape-level planning guide for forest management, an MNR employee reported: “The lack of an MNR wilderness definition may be an issue. Internationally there is a definition of not roaded within 1 km. This excludes areas where a road has been removed. It is really unmanaged, primal forest. Roads in Ontario are at various stages of use, which complicates the issue;” Provincial Forest Technical Committee – Summary of Discussions (8 October 2003) at 4.

Thereafter, an MNR working group was tasked with addressing the management of wilderness characteristics on the intervening landscapes within the AOU, outside parks and other types of protected areas, and to determine if there are any changes required to existing resource management and operational planning guides.²¹⁹ A discussion paper – which remains in confidential, draft form – was prepared,²²⁰ but the work has not gone forward. In 2001, in a meeting regarding the development of new forest management guides, it was argued that providing any direction in such guides that would require planners to, for example, minimize road density for the purpose of protecting wilderness values, would be setting new policy – something which the guide development process is apparently not meant to do.²²¹ From this perspective, the decision to build a road to access the timber resource is considered to be a forest management planning matter, but the decision not to build a road (or to build it elsewhere) in order to protect remote wilderness is considered to be a land use planning policy issue that falls outside the scope of the forest management planning process.²²² Similarly, Ontario's Professional Planners Institute has argued that forest management guidelines which require foresters to plan to leave large areas of intact forest on the landscape (to provide remote wildlife habitat or emulate natural disturbance patterns) usurp the role of land use planning within the AOU.²²³

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219. MNR, *Annual Report on Forest Management 2001/2002* (Ontario: Queen's Printer, 2004) at 94. See also Paul A. Gray & Robert J. Davidson, "An Ecosystem Approach to Management: A Context for Wilderness Protection," (2000) *USDA Forest Service Proceedings RMRS-P-15*, Vol. 2, and Robert J. Davidson *et al.*, "State-of-the-Wilderness Reporting in Ontario: Models, Tools and Techniques," *ibid.*
220. MNR, *Annual Report on Forest Management 2001/2002* (Ontario: Queen's Printer, 2004) at 94.
221. MNR, Provincial Forest Technical Committee – Summary of Discussions (27 March 2001) at 4. See also Provincial Forest Policy Committee – Summary of Discussions (10 March 2004) at 2: "Guides have the potential to influence land use planning and it is possible that there is a disconnect between the direction in guides and forest policy."
222. See Provincial Forest Policy Committee – Summary of Discussions (10 March 2004) at 4-7: "Forest Management Planning and Roads."
223. Submission from the Ontario Professional Planners Institute to the Timber EA Renewal Project (18 February 2002) at 2: "We are concerned about the application of MNR's large landscape-oriented forest management guidelines, specifically the caribou and marten guidelines and the new *Guide for Natural Disturbance Pattern Emulation*, specifically where they remove or 'zone out' large areas of production forest. Essentially this results in *de facto* land use planning, and the preemption by forest management planning of what is properly land use decision-making in Ontario's Crown land and resource planning system."

Lack of clarity in this area can make it difficult to audit compliance with the CFSA, since certain measures intended to protect wildlife have the effect of reducing available harvest area, which affects wood supply.²²⁴ From an auditing perspective, wood supply commitments must be met,²²⁵ while wildlife habitat supply is only an indicator of sustainability (not a performance measure).²²⁶ Even though the application of forest management planning guides for the protection of various wildlife species does, in principle, exclude certain areas within FMUs from logging, in its independent forest audit reports, one forest auditing firm consistently instructed planners as follows:

Land allocations for specific wildlife mosaic blocks or core areas should not be withdrawn or deferred in the calculation/determination of the available harvest area. Only lands where forest management operations are specifically excluded, though a land use planning decision or a specific reserve prescription, should be withdrawn from the available forest area.²²⁷

In 2002, in commenting on a draft Declaration Order that would replace the Timber Class EA, Environment Canada noted:

It does not appear that the MNR has met the intent of the EA Board's original Terms and Conditions (T & C's) of approval of the Timber Class EA with respect to a number of areas that could potentially affect the interests of EC. For instance, uncertainties appear to remain regarding the fulfillment of original T&C 27 regarding Clearcuts (with respect to the restriction on harvest size), T&C 103 regarding Old Growth Forests (with respect to the development of an Old Growth Forest policy and strategy), and T&C 106 regarding Roadless Wilderness (with respect to development of a policy specifically relating to Roadless Wilderness). These obligations relate to aspects of forestry management that could affect our interests regarding the conservation of migratory bird populations and sustainable ecosystem management within the Great Lakes Watershed.²²⁸

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224. Callaghan & Associates Inc., "Spruce River Forest Independent Forest Audit – Final Report 1996-2001" (prepared for MNR) (November 2001) at i. See also 2001 independent forest audit reports for the Lake Nipigon and Auden Forests, Black Sturgeon Forest and Armstrong Forest.
225. See MNR, *Independent Forest Audit Process and Protocol* (Draft) (Ontario: Queen's Printer, 2001) at A-47: "The FMA (Forest Management Agreement) holder must maintain cutting operations at a level between 90% and 110% of the maximum allowable depletion, except for areas declared surplus or in reserves."
226. Callaghan & Associates Inc., "Spruce River Forest Independent Forest Audit – Final Report 1996-2001" (prepared for MNR) (November 2001) at i.
227. *Ibid.* See also MNR, "Marten Habitat Guide Interpretation Note" (30 September 2004) at 5-7: "Deferrals of Core Marten Habitat Areas."
228. Letter from Head, Environmental Assessment Section, Environment Canada-Ontario Region to Project Manager, Timber EA Renewal Project, Ontario Ministry

5.3.2.2 Planning for wildlife values outside the forest management system

In 1997, it was expected that MNR would be developing regional land use strategies, followed by sub-regional land use plans, for the planning area encompassing the AOU.²²⁹ The *Public Lands Act* was amended in 1998 to create a framework for land use planning on Crown lands, and these amendments stipulate that actions on public lands must be consistent with MNR-approved land use plans.²³⁰ These amendments are not yet in force.

Though regional land use strategies and sub-regional land use plans have not been developed, the forest management planning system developed in the mid-1990's under the CFSA assumes that they are or will be in place.²³¹ Thus, for example, the 1996 *Forest Management Planning Manual* provides:

The forests within management units are part of larger forested ecosystems. As part of the broad sub-regional planning that MNR will undertake

of the Environment (16 September 2002) at 1. Environment Canada's comments went on to state: "The proposed T&C's remove obligations related to harvesting methods (clearcuts), road-less wilderness, inventory and values mapping, wildlife population and environmental effects monitoring, and implementation of the Ecological Land Classification (ELC) system and a northern Ontario wetlands evaluation program to the entire area of the undertaking. In addition to the re-instatement of references to obligations related to these values, we recommend that the Timber Class EA be enhanced to include commitments related to consideration [sic] the implications of climate change." *Ibid.*

229. MNR, *Lands for Life – A Land Use Planning System for Ontario's Natural Resources* (Ontario: Queen's Printer, 1997) at 10.

230. See Appendix 5.

231. *2000 Report on Guidelines Review* at 40:

"4.2.4 Subregional Basis for Goal Setting

Some of the present guides contain spatial requirements or considerations which should, in theory, transcend SFL boundaries. For example, the caribou guide states that habitat supply should be assessed on an area approximately 700,000 ha in size. Although this is within the average size of many SFLs, most suitable areas of this size would cross at least one SFL boundary. The marten guide calls for core habitat areas of 3,000-5,000 ha of old conifer forest, a condition which, in some areas, is much more easily satisfied when areas crossing SFL boundaries are included in the search. Another example is the fire emulation analysis results, which suggest frequency distributions for clearcuts using site regions as the spatial basis. The design and requirements of these guidelines is consistent with a planning scale that exceeds the individual SFL.

The notion that the SFL is too small a geographic unit to accommodate some key aspects of forest planning is not new. The second phase of the Lands for Life process

as a result of the planning system review (see Appendix IX),²³² objectives will be established for the larger eco-regional forests. When those higher order objectives are in place, individual management units will be required to contribute to their achievement. Compliance with this regional strategic direction will be important if MNR is to meet its commitment to ecosystem-based natural resource management.²³³

was to have been the development of subregional planning in the province (MNR 1997). The Forest Resource Assessment Policy (FRAP) requires that:

For each sub-regional land-use plan within each of the three MNR administrative regions, FRAP requires the assessment of forest resource production based on a mix of land uses which reflect regional level strategies for activities such as protection, tourism and wood supply and incorporates guidance from citizens' committees and public consultation.

Some significant aspects of the FMPM are based on the assumption that a subregional planning process will be in place (e.g., several sustainability indicators of the Report of Past Forest Operations are to be assessed on a regional or subregional basis; these are to be used in the development of future plans and sustainability objectives). The FMPM itself notes that:

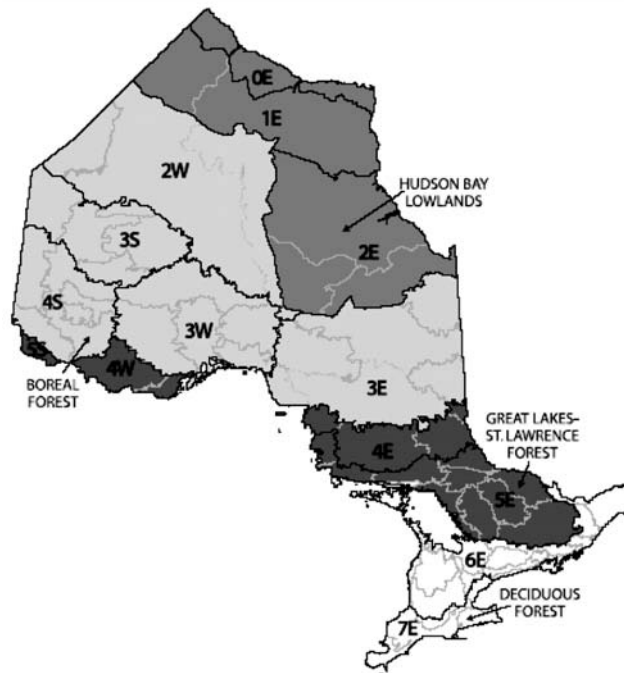
The new planning system will include ecologically-based planning at a broad subregional level. The resulting Ecological Land Use Plans will provide context and "direction for operational planning at the local level, for forest management activities and other natural resource management activities."

It seems, however, that the intended development of subregional planning is, if not dead, then certainly dormant. With the initial Lands for Life exercise developing as it did, the government's focus has shifted away from the original intent (which included the second phase of developing subregional plans) to implementing the Living Legacy and the Forest Accord. Although interest in subregional planning remains alive in MNR, the corporate and political will to embrace it seems to have waned. This leaves a somewhat troublesome situation in which the main vehicle for forest management planning (i.e., the FMPM) is, in some ways, not able to appropriately deal with objective setting and allocation at scales larger than an SFL."

232. Not reproduced herein.

233. FMPM 1996 at A-42. See also R. Edward Grumbine, "What Is Ecosystem Management?," (1994) 8 *Conservation Biology* No. 1 at 27: Abstract: "The evolving concept of ecosystem management is the focus of much current debate. To clarify discussion and provide a framework for implementation, I trace the historical development of ecosystem management, provide a working definition, and summarize dominant themes taken from an extensive literature review. The general goal of maintaining ecological integrity is discussed along with five specific goals: maintaining ecological process (i.e. natural disturbance regimes), protecting evolutionary potential of species and ecosystems, and accommodating human use in light of the above. Short-term policy implications of ecosystem management for several groups of key actors (scientists, policymakers, managers, citizens) are discussed. Long-term (>100 years) policy implications are also reviewed including reframing environmental values, fostering cooperation, and evaluating success. Ecosystem management is not just about science nor is it simply an extension of traditional resource management; it offers a fundamental reframing of how humans may work with nature."

Figure 5. Map of the forest regions and ecoregion boundaries in Ontario²³⁴



It was expected that once sub-regional land use plans were in place, “[d]ecisions on local operational planning will be monitored to see how well they achieve the sustainability targets and resource management objectives established by upper level planning decisions.”²³⁵ To that end, the Timber Class EA required the formation of Regional Advisory Committees to “provide advice in translating provincial goals into regional objectives. These committees will also scrutinize the progress in achieving management unit, district and regional objectives.”²³⁶ In 2002, in an application for an extension of the Timber Class EA, MNR commented on the operation of the regional advisory committees, which were formed in 1999:

One of the responsibilities of the Regional Advisory Committees was to play a role in reviewing numerically quantified regional objectives provided to them by MNR. This was based on the assumption that MNR

234. MNR, *State of the Forest Report (2001)* (Ontario: Queen’s Printer, 2002) at i-8.

235. MNR, *Lands for Life – A Land Use Planning System for Ontario’s Natural Resources* (Ontario: Queen’s Printer, 1997) at 11.

236. Timber Class EA Reasons for Decision and Decision at 430.

would follow a 'top down' process of translating provincial level objectives and targets into regional and management unit level objectives and targets. This notion however, ran counter to MNR's management model of sustainability that flowed from the *Crown Forest Sustainability Act*. In other words, MNR took the 'bottom up' approach of determining sustainability at the management unit level, which meant objectives and targets for forest management were first set out in local forest management plans and were not assigned to the unit from regional or provincial levels. As a result of this bottom up approach, Regional Advisory Committees have not been asked to review numerically quantified regional objectives, and have focused their attention elsewhere. For example, the Regional Advisory Committees have focused most of their attention on providing advice to the MNR Regional Director on forest management issues.²³⁷

In 2004, at a meeting of the Provincial Forest Technical Committee,²³⁸ it was suggested by an MNR employee that MNR may decide to pursue a different direction:

[Name deleted] provided an overview of MNR's land use and resource planning system, some possible improvements and discussed the linkages to forest planning and the landscape guide.

[Name deleted] spoke to the concept of sub-regional planning (12-15 plans) and the current thinking of another possible approach. He discussed the recent history of land use planning, some of the lessons learned, including use of internet technology. The proposals included Regional Natural Resource Strategies, updated land use planning process and proclamation of *Public Lands Act* (PLA) amendments. He spoke to the Regional Natural Resource Strategies (RNRS) which would be applied at the eco-regional scale. These strategies may provide a range of targets or metrics including measures that could be discussed with the public. Strategies would be developed to achieve a desired future condition.

237. MNR, "MNR's Timber Class EA Review" (17 July 2002) at 190.

238. Timber Class EA Reasons for Decision and Decision at 430: "At the provincial level, a Provincial Technical Committee (PTC) shall be established. This committee will review and update technical guidelines, construction/operational manuals, and resource/environmental manuals related to the management of timber and non-timber resources. (See Condition 89)." *Ibid.* at 459: "89. MNR shall establish the Provincial Technical Committee for Timber Management as a standing committee comprised of both government and non-government members. The purposes of the Committee are to ensure that implementation manuals are kept current in light of applicable scientific knowledge and advances in analytical and operational technology, and to set priorities for work on existing or new implementation manuals. The committee may include members of the public as well as persons with professional and technical resource management expertise and familiarity with the technical aspects of timber management."

[Name deleted] discussed some examples of the concept by site region with some high level direction. He showed where the priorities are within the concept but this would take some time to develop and implement.

He reviewed the land use planning sources and the Crown Land Use Policy Atlas. He spoke to the tools for amendments and a more responsive approach to keep the planning direction current rather than waiting for more comprehensive land use planning initiatives to be implemented.

He noted that the amendment to the PLA (*Public Lands Act*) would make 'actions consistent with land use plans' a legal requirement.

Implementation of the RNRS would be phased in.

It was questioned if it would be confusing to the public when asked to review a RNRS? Advisory committees that were well informed may be asked to provide a review. The level of senior MNR support was questioned. A small working group to develop a straw dog will be used to begin the process. There is some concern that this may become too onerous and/or that there won't be enough support from the Executive of MNR.

It was questioned how MNR will apportion the targets to SFL's. This is recognized as one of the tougher issues that will have to be resolved but no specific methods [have] yet been developed.²³⁹

At the time of writing this factual record, in November 2005, a website maintained by the Conservation Council of Ontario, listing Ontario's formal environmental strategies, states the following under the heading "Conserve Resources": "No formal strategies have been published with respect to the conservation of natural resources, including foodland, fish and game, timber, minerals and aggregates, and energy."²⁴⁰

5.3.3 *Shaping the forest through management*

Within the framework of policy and planning direction outlined above, Ontario's system for forest management establishes the process for determining where and when trees will be logged, and what, if any, actions will be taken to regenerate the forest. This system was designed

239. MNR, Provincial Forest Technical Committee – Summary of Discussions (28 April 2004) at 4.

240. Conservation Council of Ontario, *Green Ontario Provincial Strategy*; online: Conservation Council of Ontario <<http://www.greenontario.org/strategy/formal.html#Conserve%20Resources>> (date accessed: 15 November 2005).

to manage wood supply. “Non-timber objectives” are expected to be adopted through processes outside and above forest management planning and achieved through implementation of forest management plans.²⁴¹ Wildlife habitat is used as an “indicator” of sustainable forest management²⁴² and as a “proxy indicator” for wildlife population status.²⁴³ In the absence of a system for integrated resource management,²⁴⁴ impacts of forestry activities on wildlife populations are difficult to discern.²⁴⁵

5.3.3.1 Managing for one or several resources

Ontario has adopted the following definition of integrated resource management:

Comprehensive management of two or more natural resources (see Resources) that integrates the values and interests of the global community when conceiving, designing and implementing policies, programs and projects to use and sustain these resources in perpetuity.²⁴⁶

Ontario’s Forest Resources Assessment Policy states:

Resource management planning is done for individual resources (e.g. forests, fisheries, water) or land use designations (e.g. provincial parks, conservation reserves). Within the MNR land use and resource management planning system, forest management plans are operational resource management plans. These plans provide direction for forest resource management and the availability of forest resources.²⁴⁷

It also states:

MNR is planning to develop additional integrated directions that will define the desired conditions for a range of ecological, social, and economic values. These directions will be provided through the development of strategies for ecologically based planning units that, in the future, will cover the entire province.²⁴⁸

241. See s. 5.3.3.2.

242. See s. 5.3.3.2.2.

243. See s. 5.3.3.2.1.

244. See s. 5.3.3.1.

245. See s. 5.3.5.

246. MNR, *State of the Forest Report (2001)* (Ontario: Queen’s Printer, 2002) at 6-14.

247. MNR, *Forest Resource Assessment Policy (Version 2)* (Ontario: Queen’s Printer, 2003) at 12.

248. *Ibid.*

The integrated directions referred to above have not been developed.²⁴⁹

5.3.3.2 Defining desired conditions for wildlife

The CFSA defines “sustainability” as “long term Crown forest health,” and defines “forest health” as “the condition of a forest ecosystem that sustains the ecosystem’s complexity while providing for the needs of the people of Ontario.”²⁵⁰ MNR scientists have explained that it is not possible to assess ecosystem health without defining the desired condition for the values one is managing for:

“Management” is a sweeping, generic term for the cadre of tools and techniques we use to meet our objectives and attain our goals. It is a controversial aspect of human endeavor and a frequent focal point of conflict because, as traditionally applied, it has failed to account for the range of values and philosophies held by the variety of peoples who comprise Earth’s cultures and societies. For example, the neoclassical utilitarian’s approach to management is radically different from the emergent eco-centrist’s perspective and approach. In addition, the term often is used to imply that people understand the complex nature of ecosystem composition, structure and function when, in fact, we do not. Is ecosystem management possible? No, not now, or in the near future. But an ecosystem *approach* to management is an encompassing endeavor that:

- Captures the range of cultural, social, economic, and ecological values that ultimately define ecosystem-human relationships
- Requires decisions be made in the context of ecosystems as holistic entities with many natural assets, not individual resources
- Is sponsored by flexible, adaptive, accountable and learning-oriented institutions
- Is participatory and knowledge-based
- Is dynamic and adaptive so that the impacts (positive-neutral-negative) of human actions are identified, monitored and constantly evaluated against prescribed measures of healthy ecosystems and healthy people
- Results in a balanced spectrum of human activities (ranging from complete protection to active manipulation of natural assets) that are at least impact-neutral.

249. See s. 5.3.2, above.

250. Ss. 2(1), 3 of the CFSA.

[...]

While most people immediately and correctly equate ecosystem health with lots of indigenous plants and animals relative to the ecosystem(s) in which they evolved, abundant clean water, forests and wetlands, there is more. Humans are an important part of the ecosphere. From this perspective, Rapport (1995) characterizes ecosystem health as a measure of the level of distress in the ecosystem, the ecosystem's resilience to perturbation, the ecosystem's ability to sustain itself, the degree to which an ecosystem's function does or does not impair the healthy functioning of adjacent ecosystems and the extent to which the ecosystem supports healthy human communities. Therefore, ecosystem health is an integrated combination of cultural health, social health, economic health, and ecological health (fig. 5) [not reproduced herein].

Does a healthy ecosystem equal wilderness? No, not necessarily. It depends on the state or condition of ecosystem health to which we aspire. In this regard, ecosystem health has operational meaning only when it is defined in terms of a desired state or condition for that ecosystem—a condition or state that we predict can be achieved and sustained. For example, society may elect to pursue activities conducive to the protection of wilderness (such as the creation of wilderness parks and strictly controlled ecotourism activities inside them), or sustained yield of timber, or agricultural products, or all of these. Each prescription requires unique decisions that result in the evolution of a unique ecosystem (Lackey 1994). Similarly, Rowe (1992b) asks to what extent should we maintain natural (areas designated for preservation—in some cases wilderness), semi-natural (areas in which resources are managed for sustained use), artificial (devoted to high input, intensive use such as farming and forestry) ecosystems, and to what extent do we establish restoration and rehabilitation programs for entire ecosystems? These questions are, of course, critical to visioning, establishing goals (such as healthy ecosystems and healthy people) and setting management objectives (such as wilderness protection targets). And, in large part, the answers are contingent upon a commitment to, and decisions respecting attainment of, a prescribed level of ecosystem health.²⁵¹

In the forest management planning system created under the CFSA, the "sustainability" of a "management alternative"²⁵² is assessed on the basis of several spatial and a-spatial indicators of sustain abil-

251. Paul A. Gray & Robert J. Davidson, "An Ecosystem Approach to Management: A Context for Wilderness Protection," (2000) *USDA Forest Service Proceedings RMRS-P-15*, Vol. 2 at 60, 63.

252. FMPM 1996 at A-46: "The combination of a set of objectives and associated strategies for their achievement is called a 'management alternative.' This section describes how management alternatives are developed and analysed."

ity,²⁵³ by examining projected future forest cover in the FMU in the year (usually more than fifty years in the future)²⁵⁴ when the “desired future forest condition” is achieved within the FMU through logging and regeneration.²⁵⁵ The 1996 *Forest Management Planning Manual* does not define what the “desired future forest condition” is, though reference is made to this concept in a number of places.

Under Strategic Direction and Determination of Sustainability, the 1996 *Forest Management Planning Manual* states:

Silvicultural ground rules specify the silvicultural systems and types of harvest, renewal and tending treatments which may be used to manage forest cover on the management unit. The silvicultural ground rules also identify the type of forest that is expected to develop over time (i.e., future condition). There is a range of acceptable silvicultural treatments for the activities of harvest, renewal and tending which can be undertaken at various intervals throughout the life of individual forest stands. The intended effect of these treatments, combined across the forest as a whole, is to direct forest development over time toward the desired future forest condition.²⁵⁶

253. *Ibid.* at A-63-64: Figure A-2 “Indicators of Forest Sustainability for Planning.” The terms “spatial” and “aspatial” or “nonspatial” are generally used in relation to geographic information systems. “Aspatial” data cannot be used in a geographic information system because it is either not available in a digital format or is not associated with a specific geographic location. See the Glossary of Terms in MNR, *State of the Forest Report (2001)* (Ontario: Queen’s Printer, 2002) at 6-14 (“Geographic Information System”); 6-15 (“Non-spatial”); and 6-18 (“Spatial” or “Spatial Database”).

254. FMPM 1996 at A-65: Table FMP-13 “Comparison of Management Alternatives.”

255. *Ibid.* at A-57-79. See also Weyerhaeuser Canada Ltd., Forest Management Plan for the Trout Lake Forest, Red Lake District, Northwestern Region, O.M.N.R., for the twenty year period from April 1, 1999 to March 31, 2019 at 28: “In addition to the ‘featured’ wildlife species, additional species are ‘selected’ regionally in order that the estimated habitat for a standard array of wildlife species may be tracked. These particular species were selected because their habitat requirements represent a broad range of characteristics. The intent of reporting the habitat is not to manage the quantity of habitat, but to assist in the assessment of change in forest conditions. This report of habitat will aid the assessment of forest management practices and their impact on forest sustainability. The selected wildlife species for which habitat needs must be addressed and/or reported in this forest management plan are the Boreal Chickadee, White Throated Sparrow, Swainson’s Thrush, American Redstart, Connecticut Warbler, Great Grey Owl, Pileated Woodpecker, Golden-Crowned Kinglet, Spruce Grouse, Bald Eagle, Great Blue Heron and the Osprey.”

256. FMPM 1996 at A-49.

It goes on to explain:

The rationale for the selected management alternative must be clearly documented in the text of the forest management plan. The rationale for the rejection of other alternatives which clearly raise questions must also be documented. Any issues arising from the analysis and choice of the selected management alternative must also be documented, particularly if higher order (i.e., district, region) targets and commitments cannot be achieved.

The selected management alternative should achieve a realistic set of benefits or outcomes through the implementation of reasonable and deliverable management strategies. The implications of the selected management alternative will be explicitly stated as a product of the analysis. The predicted future forest condition of the selected management alternative becomes the desired future forest condition to be achieved over time through successive forest management plans.²⁵⁷

In the absence of higher order targets and commitments, the desired future forest condition for each management unit is determined on the basis of achieving wood supply targets and considering sustainability indicators established for that management unit.²⁵⁸ Wood supply commitments must be met.²⁵⁹

257. *Ibid.* at A-71.

258. Timber Class EA Reasons for Decision and Decision at 438: "Non-timber Values: Strategies, Problems and Issues": "23. (a) Each Timber Management Plan shall identify the management objectives for non-timber values which exist in other plans or policies, and which could be affected by timber management activities to be carried out under the Plan. Problems and issues with respect to those objectives which are related to timber management activities will be described. Timber management strategies intended to assist in meeting those non-timber objectives which involve the manipulation of forest cover will be described in the Plan.

(b) The specific sources of the existing objectives (e.g. District Land Use Guidelines, resource management plans, government agreements with native people) shall be stated, and the geographic area for which those objectives have been developed shall be identified.

(c) Where management objectives for non-timber values are not identified in other plans or policies and such non-timber values can reasonably be dealt with in a Timber Management Plan through manipulation of forest cover, Timber Management Plans may determine management objectives for them."

259. *Ibid.* at 437: "Timber Management Objectives and Strategies, Problems and Issues:" [...] "(b) Each Plan shall provide measurable and quantifiable objectives for timber production objectives detailing annual levels of production for each of the five years covered by the Plan, for the five-year Plan in total and where possible, for the remaining five year increments of the 20-year planning horizon. These figures shall be broken down by hardwood, conifer and tree species." See also MNR, *Independent Forest Audit Process and Protocol* (Draft) (Ontario: Queen's Printer, 2001) at A-47:

5.3.3.2.1 *Wildlife as an indicator of sustainable forest management*

From a forestry perspective, maintaining wildlife diversity and abundance is considered to be an indicator of sustainable forest management.²⁶⁰ Measuring this indicator is difficult in the absence of monitoring information for most wildlife in the forest, including migratory birds,²⁶¹ and Ontario does not require the forest industry to carry on or pay for such activities.²⁶² Forest management plans are required to contain objectives only for benefits or outcomes that can be achieved by managing forest cover.²⁶³ Thus, in the section on standards for forest management activities, Ontario's *Forest Operations and Silvicultural Manual* explains:

3. Fish and Wildlife Habitat Management

MNR's policy is to ensure that no species declines on a provincial scale because of forest management activities. Consideration will be given to "provincially featured species" when developing wildlife habitat management objectives for forest management plans and operational prescriptions.

Provincially featured species are moose, white-tailed deer, pine marten and pileated woodpecker, along with threatened and endangered species.

"The FMA (Forest Management Agreement) holder must maintain cutting operations at a level between 90% and 110% of the maximum allowable depletion, except for areas declared surplus or in reserves."

260. For e.g., "Conserving Species Diversity in Ontario's Forests" is considered by MNR to be an indicator of sustainable forest management, and that involves "Maintaining Populations and Habitats of Forest-Dependent Species;" MNR, *State of the Forest Report (2001)* (Ontario: Queen's Printer, 2002) at 3-33 and 3-35. In addition, MNR has stated: "It is MNR policy to ensure that species populations do not decrease provincially as a result of forest management activities;" *ibid*.
261. See *2000 Report on Guidelines Review* at 78: "The application of the forest management guides relies heavily on the information available to planning teams and the analytical tools used to infer relationships between the forest and the values being protected. In our consultations, we continually heard complaints about the lack of appropriate data and the increasing reliance on analytical tools that in some cases were felt to be less than adequate for the required tasks."
262. See FMPM 1996 at A-7. Under "inventories," information from population surveys is only required for moose, deer and caribou. In addition, under "values maps," the FMPM required only *known* natural resources features, land uses, and values "about which further inventory information is available" to be mapped, with the maps to be used "primarily as background information for planning [...]"
263. MNR, *Forest Resource Assessment Policy (Version 2)* (Ontario: Queen's Printer, 2003) at 22: A1.11 *Management Objectives and Targets*: "The management objectives stated in approved forest management plans are developed for benefits or outcomes that can be achieved by managing forest cover over the long-term."

Consideration is also to be given to “locally featured species” when managers wish to provide for species of local importance.²⁶⁴

Wildlife habitat is therefore used as a proxy indicator for tracking wildlife sustainability, and a cross-section of species is considered to be representative of the totality of species. Using habitat as a proxy for wildlife sustainability of indicator species during forest management planning assumes, first, that tracking habitat is an adequate proxy for tracking wildlife, and that: habitat associations of indicator species are well understood; the mix of selected species provides adequate proxies for all wildlife in the forest; information on habitat in the FMU is complete and accurate; habitat is “fungible” (from a wildlife perspective, habitat from one area can be replaced with habitat from another area, as areas are logged and regenerated over time, and post-logging habitat is interchangeable with naturally-occurring habitat); historical information on scale, frequency and distributions of natural disturbances and regeneration processes and timeframes exists or can be inferred accurately through computer modeling, this information can be used to plan logging and regeneration efforts to emulate natural disturbance patterns and predict accurately the process and rate of regeneration going forward, taking into account emerging factors such as climate change; money is available for silviculture, silviculture is being done, and silvicultural efforts are successful.

For the sustainable forest management criterion “multiple benefits to society,” these are the indicators:

FIGURE A-2
INDICATORS OF FOREST SUSTAINABILITY FOR PLANNING (CONTINUED)

Criteria	Measurable Indicator		Aspect of Criterion Assessed	Acceptable Levels for Measurable Indicators
	Spatial	Non-Spatial		
Multiple Benefits to Society		Managed Crown forest area available for timber production (by forest unit)	Maintenance of managed Crown forest area available for timber production	Selected management alternative should maximize the area of managed Crown forest that is available for timber production, while achieving other objectives
		% of Available Harvest Area which is actually utilized (by forest unit)	Level of societal benefit	Selected management alternative should best match supply and demand
		Habitat for selected wildlife species	Intrinsic value of forest-dependent species, including economically important species	Selected management alternative should not threaten availability of preferred habitat for selected wildlife species at the eco-regional level

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264. MNR, *Forest Operations and Silviculture Manual*, 1st ed. (Ontario: Queen’s Printer, 1995) at 14.

As regards habitat for wildlife, the measure of sustainability for a forest management alternative is whether it threatens the availability of preferred habitat at the eco-regional level. MNR has explained:

The FMPM requires that the Preferred Management Alternative should 'not threaten the availability of preferred habitat for selected wildlife species at the eco-regional level.' However, information on wildlife habitat at this scale is not available. Thus, an approach similar to the forest diversity section is employed. (See Forest Diversity Section.)²⁶⁵

As regards indicators of forest diversity, MNR has stated:

Habitat supply analyses can be conducted and used in a number of ways. For species like deer and moose, population targets may already be defined (e.g. target winter carrying capacity of 15 deer/km² in a specific yard). Habitat supply analysis software can be used to analyze the current carrying capacity of a yard and identify habitat components that may be limiting (e.g., a yard may have lots of cover but currently little food). Allocations can then be directed to minimize impacts on sensitive habitat components (e.g. critical blocks of thermal cover) and maximize other benefits (e.g., increase browse supply by harvesting stands adjacent to cover). For many species (e.g. Non-game) population targets are not available and this is the case for pileated woodpeckers. Planning teams can establish at least 5 year spatial habitat objectives for the area of preferred habitat based on estimates of the current spatial supply of habitat, as well as, non-spatial preferred habitat from the SFMM (strategic forest management model) analysis.

[...]

Regardless of the species being modeled, teams should project current inventory into the future incorporating proposed allocations. Rerunning the habitat models on this projected database will demonstrate the impacts of the proposed allocations. If habitat targets are not achieved, planned allocations can be revised.²⁶⁶

265. MNR, "Landscape Analysis & Assessment Paper for Southcentral Region Management Units – 2004 SCR FMP Teams" (draft) (30 January 2002) at 14. See also s. 48.1 of the *Inclusion List Regulations* (SOR/99-436) adopted under the *Canadian Environmental Assessment Act*, which also uses ecological land use planning terminology and the notion of 'threats' in extending the reach of federal environmental assessment legislation to "[p]hysical activities that are carried on in Canada outside a national park reserve, national historic site or historic canal and that are intended to threaten the continued existence of a biological population in an ecodistrict, either directly or through the alteration of its habitat, except for activities carried on at or in the immediate vicinity of an airport to ensure the safe operation of aircraft."

266. *Ibid.* at 24.

MNR has specified:

If any landscape values change by more than 10%, the change must be ecologically justified (e.g., forest is reverting to a more natural/historical condition).²⁶⁷

5.3.3.2.2 Tracking wildlife habitat

Under "Management Unit Description," the 1996 *Forest Management Planning Manual* requires plan authors to provide information on preferred habitat for certain wildlife species and projections on the effects of different management alternatives on habitat amount:

(d) Habitat for Selected Wildlife Species

The selected wildlife species for which habitat needs must be addressed in the forest management plan must be identified, and a description of the current status of their habitat must be provided at different geographical scales. For each of the selected wildlife species, the habitat which is currently available, and the habitat which is required in the future forest condition, must be presented in Table FMP-5, and discussed in the plan text. The table must also present the contribution from the management unit to the habitat available for each species in a provincial, regional, and sub-regional context, and the percentage change in habitat available in the management unit since the last plan was prepared.

The plan text must discuss the significance of any changes in the area of habitat for each selected wildlife species, and the implications in terms of any required changes to management strategies.²⁶⁸

Table FMP-5, referenced above, is organized as follows:²⁶⁹

MANAGEMENT UNIT NAME: _____
PLAN TERM: _____ TO _____

FMP-5 HABITAT FOR SELECTED WILDLIFE SPECIES

Selected Wildlife Species	Provincial		Regional		Sub-Regional		Management Unit		
	Current (km ²)	Current (km ²)	% of Provincial	Current (km ²)	% of Regional	Current (km ²)	% of Regional	% Change from Previous Plan	Desired Future Forest Condition (km ²) at <year>

267. *Ibid.* at 22.

268. FMPM 1996 at A-24.

269. *Ibid.* at A-29.

The instructions for filling in Table FMP-5 are the following:²⁷⁰

INSTRUCTIONS

FMP-5 HABITAT FOR SELECTED WILDLIFE SPECIES

The purpose of this table is to summarize the current status of the preferred habitat for selected wildlife species. Habitat for selected wildlife species is an indicator of forest sustainability that is used to help describe the forest condition. The table is prepared by the plan author as part of the management unit description. A preliminary version of the table, with all columns complete except for the "Desired Future Forest Condition" column is normally available for Stage One of public consultation. A complete version of the table must be available for Stage Two of public consultation.

Enter the management unit name and plan term at the top of the page.

Complete the set of tables as follows:

Selected Wildlife Species:

Enter the common names of the selected wildlife species occurring on the management unit. The selected species should include as a minimum, the appropriate Provincially and locally featured species. Provincial/regional analysis may reveal other species whose habitat is rare and/or diminishing at the Provincial/Regional level. Where the management unit is important in maintaining or improving habitat for these species, they will be included as selected wildlife species.

Provincial, Regional, Sub-Regional, Management Unit:

Current:

Enter the area in km² of preferred habitat for each of the selected wildlife species which is provided by the current forest cover at each of the Provincial, Regional, Sub-Regional and Management Unit levels.

% of Provincial:

Enter, as a percentage, the ratio of current available preferred habitat for the selected species at the Regional level to the current area of preferred habitat available for each species provincially.

270. *Ibid.* at A-30.

% of Regional

Enter, as a percentage, the ratio of current available preferred habitat for the selected species at the Sub-Regional and Management Unit levels respectively to the current area of preferred habitat available for each species regionally.

% Change from Previous Plan:

Enter the percent change (+ or -) since the last plan was prepared in the amount of preferred habitat area available for each selected wildlife species for the Management Unit.

Desired Future Forest Condition:

Enter the amount of available preferred habitat area (km²) for the selected wildlife species for the Management Unit that is predicted by the Selected Management Alternative for the "Year" presented in Table FMP-13.

One forest management plan author explained:

The Desired Future Forest Condition figure in FMP-5 for species specific habitat does not necessarily represent the optimal condition for any particular species. Rather, it is the amount of preferred habitat when (2079) the desired future forest condition is reached (all indicators of sustainability are at an optimum level for the selected management alternative).²⁷¹

In order to complete Table FMP-5, forest management planners in Ontario have used a computer program called the "Strategic Forest Management Model" or "SFMM." The 1995 *Forest Operations and Silviculture Manual* explains:

SFMM was designed to model production capabilities of a forest given various levels of management intensity (Davis, 1994). Soon it will also include habitat matrices for a selection of wildlife species representing five forest age classes and all forest units in each forest management unit. SFMM will project the decrease or increase in habitat that will result from the inputted data.²⁷²

271. Bowater Pulp and Paper Canada Inc., "Forest Management Plan for the Brightsand Forest, Thunder Bay District, Northwestern Region, O.M.N.R., for the twenty year period from April 1, 1999 to March 31, 2019" at 57.

272. MNR, *Forest Operations and Silviculture Manual*, 1st ed. (Ontario: Queen's Printer, 1995) at 31. In the Timber Class EA Reasons for Decision and Decision at 398-99, Ontario's Environmental Assessment Board stated the following: "MNR commissioned a study on habitat supply modeling from ESSA consulting firm. The report,

MNR scientists have observed:

The Ontario Ministry of Natural Resources is responsible for ensuring the sustainability of the habitat that supports wildlife and for ensuring that logging does not result in a long-term decline of any forest vertebrate (E.A. T&C 80/81). This mandate is implemented through CNFER (Centre for Northern Forest Ecosystem Research) research, the wildlife assessment units, and the forest management planning process. The primary tool used to assess sustainability of most wildlife habitat is the Habitat Matrix, which is implemented through the Strategic Forest Management Model (SFMM). This procedure is essentially a non-spatial habitat model that assigns a habitat unit (HU) to a particular combination of overstorey composition and age within a stand. For each species in the matrix, each HU is valued as suitable, marginal, or unsuitable habitat for the target species. Regardless if the HUs are small in area, fragmented, and widely dispersed, or alternatively, large and clumped, the same cumulative value (habitat supply) is assigned because the model simply sums the total area of suitable versus unsuitable habitat. This approach does not accurately reflect the true value of HUs within the forest management unit. Because some species are edge-dependent, and others avoid edges and prefer large blocks of interior forest, the size, dispersion, and juxtaposition of HUs is critical to the valuation of stands as species-specific habitat.²⁷³

Habitat Supply Analysis and Modelling: State of the Art and Feasibility of Implementation in Ontario (Ex. 2068), was released in June 1991, and recommended that adoption of HSA (habitat supply analysis) as an operational tool within the Ministry could help to address current limitations of the planning process by providing foresters and wildlife biologists with quantitative estimates of the wildlife habitat(s) afforded by alternative management proposals" (Ex. 2068, p. i). The recommendation which OFAH (Ontario Federation of Anglers and Hunters) then based their proposals on is 'in the short term, on the order of two to three years, it should be feasible to implement a primitive form of HSA, using simple non-spatial HSM (habitat supply models) in which habitat is defined simply by development state of different FRI (Forest Resources Inventory) stand types (Ex. 2068, p. ii). The authors also concluded that the sophisticated HSM needed would require spatial analysis, and that implementation across the province would take 10 to 15 years because it would need an operational GIS (geographic information system) and digitized data. A small number of individual units could be operational within five years." See also G.L. Holloway *et al.*, eds., "Habitat Relationships of Wildlife in Ontario: revised habitat suitability models for the Great Lakes-St. Lawrence and Boreal East forests," MNR, Science and Information Branch, Southern Science and Information and Northeast Science and Information Joint Technical Report #1 (Ontario: MNR, 1994).

273. See Rob Rempel *et al.*, "Model-based Field Sampling of Song Birds," CNFER Large Scale Ecology Program, Research Program, online: Lakehead University <http://flash.lakeheadu.ca/~rrempe/ CVX/research_program.htm> (date accessed: 14 December 2005).

MNR is working on incorporating spatial habitat models into forest management planning, but there are concerns about industry and MNR capacity for working with such models, and the required investments of time and money.²⁷⁴

5.3.3.2.3 Migratory bird habitat under forest management plans identified by Submitters

Dr. David Euler, on behalf of the Secretariat (see s. 5.1, above), reviewed all the forest management plans identified by the Submitters. Some plans did not contain Table FMP-5 (because they were developed before the SFMM habitat matrices were available),²⁷⁵ while others contained obvious errors in Table FMP-5 (see Appendix 6). For the thirty-eight (38) remaining forest management plans, Dr. Euler reviewed Tables FMP-5 for habitat projections for birds covered by the MBCA. Using the tables, he compared “current habitat” for those species (i.e. habitat available in the FMU at plan inception) with projected habitat at the date when the “desired future forest condition” would first be achieved. For nine (9) of the ten (10) species, the selected forest management alternative was projected to create a “desired future forest condition” with a smaller amount of preferred habitat for those species. The total projected habitat decrease under the thirty-eight (38) forest management plans, taken together, ranges from 8% for Blackburnian Warbler to 35% for Pileated Woodpecker.

274. See MNR, Provincial Forest Technical Committee – Summary of Discussions, “Decision Support System and Spatial Modeling” (28 February 2001) at 7; (20 June 2002) at 7-8; (25 June 2003) at 3; (20 October 2004) at 8-9.

275. Eighteen FMPs covered by the factual record came into force on 1 April 1997: Auden, Big Pic, Caribou, Dryden, Hearst, Highrock, Kenora, Lac Seul, Lakehead, Martel, Nagagami, Nakina North, Ogoki, Pineland, Romeo-Malette, Superior, Temagami, and Timiskaming. None of these plans contained considerations for conserving migratory bird habitat. Eight plans came into force in 1998: Cochrane, Driftwood, Moose River, Red Lake, Timmins, Wabagoon and White River. These plans contained too little information on migratory bird habitat to be included in the analysis.

Table 1. Projected habitat change under 38 Ontario FMPs for 10 birds covered by the MBCA

Bird species	Number of plans that reported on projected future habitat for this species	Number of plans that projected a loss of habitat for this species	Number of plans that projected a gain in habitat for this species	Total projected loss of habitat if the plans are carried out as proposed	Total projected gain of habitat if the plans are carried out as proposed
American Redstart	12	5	7		566 km ² (5%)
Bay-breasted Warbler	15	12	3	5500 km ² (24%)	
Blackburnian Warbler	7	6	1	723 km ² (8%)	
Black-backed Woodpecker	15	12	2	753 km ² (9%)	
Boreal Chickadee	27	24	2	3,254 km ² (28%)	
Golden-crowned Kinglet	14	11	3	2,194 km ² (20%)	
Least Flycatcher	23	21	1	3401 km ² (12%)	
Pileated Woodpecker	34	26	7	7,256 km ² (35%)	
Ruby-crowned Kinglet	22	18	4	2,087 km ² (16%)	
Swainson's Thrush	13	10	3	1,967 km ² (11%)	

Ontario's *Habitat Management Guidelines for Cavity Nesting Birds* (1984), which cover three species listed above,²⁷⁶ provide:

Management for a Critical Species

In relation to habitat, the pileated woodpecker has the narrowest ecological requirements of all cavity-nesting birds. Yet it provides the largest cavities that may be of critical importance for a number of secondary cavity users. Thus, this species can be a key indicator of the retention of a complete community of hole-nesting birds.

Pileated woodpeckers cannot be accommodated by leaving snags in areas otherwise clearcut. Careful management is needed to provide the necessary forest requirements. If managers can succeed in perpetuating pil-

276. Black-backed Woodpecker, Boreal Chickadee, Pileated Woodpecker.

eated woodpeckers, they can be reasonably confident that provision of suitable habitat for other hole-nesting birds will require comparatively simple measures (McClelland et al. 1979).

[...]

Legislation

Most cavity-nesting birds are protected under the provisions of the *Migratory Birds Convention Act* of 1917. This Act prohibits killing of birds, collecting their eggs, keeping birds captive or selling and trading birds or their eggs. Several cavity-nesting raptors not included in the *Migratory Birds Convention Act* are afforded protection by the *Game and Fish Act of Ontario*, 11 RSO 1980, C182. Their habitats are not specifically protected, but without continued provision of suitable breeding areas, laws protecting the birds themselves cannot preserve the species.

Minimum Standards

Managers may be tempted to shorten rotation times for forest cutting in an attempt to provide only the minimum standards necessary for the maintenance of the most critically threatened wildlife species. In the long run, this may bring about a biological disaster. The provision of only minimum habitat requirements may lead to suboptimal conditions that can lead to low nesting success, and eventual extinction of a population. Continued selection toward minimum standards could shift the genetics of the population, reducing the buffering effects of natural genetics that provide for natural environmental changes (Connor 1979).

But by providing optimum requirements, or at least a range of habitats, some of which exceed the known requirements, we can achieve the goals of multiple use without any gradual negative effect on species we wish to preserve.

Wild Areas

A growing number of people believe that every manager of forests should protect significant and representative areas from all habitat manipulation (Robbins 1979, Temple et al. 1979, Bury et al. 1980, Luman and Neitro 1980).

These areas serve as reservoirs of species that need mature vegetation for survival. They serve as biological indicators against which to measure the effects of various management practices. They provide a quality gene pool for forest tree species. In some instances they may be essential to the sur-

vival of some very rare species. If for no other reasons than moral and ethical, we should consider some areas inviolate.²⁷⁷

Ontario's Habitat Management Guidelines for Warblers of Ontario's Northern Coniferous Forests, Mixed Forests or Southern Hardwood Forests (1984), which cover three species listed above,²⁷⁸ contain similar provisions.²⁷⁹

5.3.4 *Dealing with uncertainty*

Ontario's forest management system relies on two concepts to address the uncertainty associated with effects of logging on biodiversity. The first is adaptive management, a kind of "learning by doing."²⁸⁰ The concept is used primarily to describe the way Ontario updates its forest management guides.²⁸¹ The second is "emulating natural disturbance patterns."²⁸² The theory is that using logging to create landscape patterns that mimic post-fire landscape patterns will be less harmful to biodiversity than other harvesting strategies.²⁸³

5.3.4.1 Adaptive management

In Ontario, the provincial government has accepted that logging on a large scale will go forward for economic and social reasons, despite lack of certainty regarding associated short and long term biodiversity impacts,²⁸⁴ though research results are meant to be incorporated into

277. See online: MNR <<http://www.mnr.gov.on.ca/mnr/forests/forestdoc/guidelines/pdfs/cavity.pdf>> (date accessed: 28 November 2005) and MNR, "Forest Management Guidelines for the Provision of Pileated Woodpecker Habitat" (1996), online: MNR <<http://www.mnr.gov.on.ca/mnr/forests/forestdoc/guidelines/pdfs/pileated.pdf>> (date accessed: 28 November 2005). For American Redstart, Baybreasted Warbler and Blackburnian Warbler, see MNR, "Habitat Management Guidelines for Warblers of Ontario's Northern Coniferous Forests, Mixed Forests or Southern Hardwood Forests" (1984), online: MNR <<http://www.mnr.gov.on.ca/mnr/forests/forestdoc/guidelines/pdfs/warblers.pdf>> (date accessed: 28 November 2005). Compare MNR, "Timber Management Guidelines for the Protection of Fish Habitat" (1988), online: MNR <<http://www.mnr.gov.on.ca/mnr/forests/public/guide/fish%20habitat%20guide.pdf>> (date accessed: 28 November 2005).

278. American Redstart, Bay-breasted Warbler, Blackburnian Warbler.

279. MNR, "Warblers of Ontario's Northern Coniferous Forests, Mixed Forests or Southern Hardwood Forests" (1984) at 9.

280. See s. 5.3.4.1.

281. *Ibid.*

282. See s. 5.3.4.2.

283. *Ibid.*

284. Timber Class EA Reasons for Decision and Decision at 64: "The planning requirements of the *Environmental Assessment Act* (s. 5(3)(c)(ii)) require the Class EA to

forest management planning on an ongoing basis, using the principle of “adaptive management.”²⁸⁵ As an approach to dealing with uncertainty in forest management, it has been observed by an MNR scientist that

describe actual and potential environmental effects of the undertaking. These effects can be both positive and negative.

MNR submits that the effects of timber management planning so closely mimic ongoing natural forest disturbance patterns, such as fire, blowdown and insect infestation, as to be acceptable. While we accept the general thrust of this submission, we find that so much uncertainty exists as to make this statement a cautious boast. In many ways, it is a theoretical claim because we have not yet seen a new forest reach mature rotation age in the place of the one MNR has been clearcutting, spraying with herbicides, and regenerating by planting and seeding at an accelerating pace since the 1960's. Ongoing careful monitoring is needed in order to subject this theory to the rigorous scrutiny it demands.

Of great concern to us and to the intervenors is the level of uncertainty associated with many potential effects. While MNR has made great strides in coping with this problem, we note that these effects by definition exist in the realm of cautious deduction and logic. We are asked to accept risks on the evidence that the forests have been subjected to human intervention for a long time and appear to be getting by. We are asked, specifically, to accept that the effects of the undertaking are not significantly different from natural disturbance patterns, that the total management approach adequately mitigates adverse effects and that there exists an adequate level of scientific and technical knowledge to cope with the residual uncertainty as to potential effects. At the same time, MNR argues that very little credible evidence has been provided to counter its case that the effects are acceptable and foreseeable such that mitigative measures can be identified, planned and implemented. We agree with this argument.”

See also *ibid.* at 163: “We are persuaded by MNR’s evidence that through proper planning and implementation, the potential for adverse impacts of clearcuts can be minimized. We are less confident that the new forest regenerating from clearcut areas will look like the natural forest that was disturbed by fire. We have little evidence that biological diversity will be maintained or lessened.”

See also Ontario, *State of the Forest Report (2001)* (Ontario: Queen’s Printer, 2002) at 5-4: “Building a set of hypotheses, or expected consequences, for effects of ecosystem changes on wildlife populations is a problem for which few solutions have been built across North America, and Ontario is no exception. Modeling concepts are being developed in the scientific community, but these have not yet been applied to management scenarios.”

285. Adaptive Management: “As the plan is implemented, MNR and the forest industry routinely monitor and assess the effectiveness of forest operations. This ensures that the forest management plan is being followed, that reports on the results of management activities are produced, and that the effectiveness of management decisions in achieving stated objectives and forest sustainability is assessed. The results of the monitoring program are used to make any necessary adjustments to the long-term management direction and the planning of operations in the next plan. The on-going process of adaptive management is critical for improving the decisions made in forest management planning” in MNR, “Forest Management Planning in Ontario;” online: MNR <<http://ontariosforests.mnr.gov.on.ca/spectrasites/viewers/showArticle.cfm?objectid=EE1704D4-CB57-406F-A26084D5F318AF53&method=DISPLAYFULLNOBARNOTITLEWITHRELATED&id=EE1704D4-CB57->

[...] where resilience is high, adaptive management is an appropriate management model that allows learning to occur as compared to areas of low resilience when the precautionary principle is more appropriate.²⁸⁶

In 1995, MNR's "Other Wildlife Working Group"²⁸⁷ articulated as follows the ministry's research needs for implementing adaptive management during forestry:

Current forest management policies of MNR directly and indirectly affect habitat for other wildlife. The current moose and deer habitat guidelines, guidelines for locally featured species such as red-shouldered hawks, and

406F-A26084D5F318AF53#adaptive> (date accessed: 19 September 2005). See also G. Blake MacDonald *et al.*, "Adaptive Management Forum: Linking Management and Science to Achieve Ecological Sustainability" (Proceedings of the 1998 Provincial Science Forum, Science Development and Transfer Series) (Ontario: Queen's Printer, 1999) and MNR, *Forest Resource Assessment Policy (Version 2)* (Ontario: Queen's Printer, 2003) at 4: "Ecosystem management includes some uncertainty, as our understanding of ecosystems is incomplete. Ontario has adopted adaptive management (Holling 1978) for policy development to address this uncertainty. The premise of adaptive management is built-in learning processes based on monitoring decision outcomes. As new data, information, scientific knowledge and decision support tools become available, they are tested through application to better understand the complex patterns and processes of ecosystems. On the ground, adaptive management achieves minimal risk because decisions taken around managing Ontario's forests are revisited strategically at scheduled times. Given active programs of research and monitoring, these time steps are sufficiently short that any misdirection can be rectified before significant area has been altered. Adaptive management is most instructive when undertaken actively (Smith and Walters 1981) and a set of alternate management activities is applied simultaneously to a number of landscapes. Learning is accelerated since outcomes are contrasted and yearly variation is controlled. However, opportunities for active adaptive management are limited by factors such as necessary scale of experiments, lack of suitable coordinating infrastructure, and social and economic pressures that require a stable and consistent policy environment across the province (the level playing field). Generally, passive adaptive management (Smith and Walters 1981) is used in forest policy development in Ontario. The cycle for passive adaptive management of Ontario's forests is policy debate, option selection, implementation, monitoring, assessment, policy debate, and so on. Learning is generated by monitoring ecosystem status, under the influence of current forest management activities directed by policy, and comparing the observed outcomes against expected outcomes of these policies."

286. Ontario, Provincial Forest Technical Committee – Summary of Discussions (8 October 2003) at 4.

287. Timber Class EA Reasons for Decision and Decision at 457: "MNR shall undertake long-term scientific studies to assess the effectiveness of the provincial guidelines for moose and fish habitat and tourism values. These studies shall include an assessment of the effects of current timber management practices on moose and other wildlife habitat, fish habitat and tourism values. Particulars of this condition are set out in Appendix 19."

the guidelines for the protection of endangered and threatened species apply directly to manipulating forest conditions at the time of timber harvest to protect habitat attributes for these species. Other strategic (Ontario Forest Policy Panel 1993) and tactical policies governing timber production (Callaghan 1994) and silviculture (Forest Operations and Silviculture Manual 1994), although not directed specifically at wildlife habitat, obviously have an impact on habitat supply and quality through their impacts on ecosystem dynamics and integrity (Figures 2 & 3).²⁸⁸ These policies have and will likely continue to have both positive and negative impacts on wildlife habitat in forested ecosystems because of the large scale of timber extraction and silviculture activities across the province.

Our current science needs are to understand these direct and indirect impacts on ecosystem dynamics and wildlife habitat dynamics (Figure 4)²⁸⁹ so that policies and guidelines can be improved to maintain wildlife species at least at current levels across the "Area of the Undertaking" (AOU). We must, therefore, design the research program within the context of these large scale policies. Guidelines (current and future) and/or forest management practices that are used at small scales to directly modify habitat for featured species will not have any significant influence on conserving habitat for wildlife across the AOU unless they are designed in the context of appropriate strategic policies that influence wildlife habitat at larger scales.²⁹⁰

To institutionalize adaptive management within MNR, in 1994, Ontario's Environmental Assessment Board ordered the establishment of two multistakeholder standing committees (Provincial Policy Committee and Provincial Technical Committee), with members of the former appointed by the Minister of Natural Resources and those of the latter appointed by the Deputy Minister of Natural Resources. The purpose of the Provincial Policy Committee is to

- (a) review the appropriateness of policies at a provincial level for timber management as well as those resources which influence or are impacted by the management of the timber resources ("the policies");
- (b) review the funding levels of the policies;
- (c) determine the inter-relational effects of the policies; and
- (d) act as a standing Advisory Committee to MNR on the matters referred to in (a), (b) and (c).²⁹¹

288. Not reproduced herein.

289. Not reproduced herein.

290. MNR Other Wildlife Working Group, "Proposal for Research on the Impacts of Timber Management on Other Wildlife" (7 September 1995) at 5-6.

291. Timber Class EA Reasons for Decision and Decision at Appendix 1.

The Provincial Technical Committee was mandated to:

- (a) ensure that implementation manuals are kept current in the light of advances in scientific knowledge and management practices.
- (b) act as a review board for proposed changes, emanating from either a field or a policy level to any implementation manual referred to in Appendix 7, and to set priorities for work on existing or new implementation manuals.
- (c) deal with any other matters identified by the deputy minister.²⁹²

The Secretariat reviewed summaries of discussions of meetings of the Provincial Policy Committee.²⁹³ Policy issues related to wood supply have been the principal topic of discussion at Provincial Policy Committee meetings. The Secretariat reviewed meeting summaries for discussions regarding the appropriateness of, and funding levels associated with, MNR's policy "to ensure that no species declines on a provincial scale because of forest management activities."²⁹⁴ During the Class EA hearings, MNR had estimated that it would cost \$10 million per year to conduct studies into the effects of logging on wildlife and the effectiveness of Ontario's guides in mitigating such effects.²⁹⁵ MNR's staff and budget were reduced by approximately 50% in the years following the issuance of the Class EA approval, and studies on the scale contemplated during the Class EA hearings and envisaged by the Other Wildlife Working Group in 1995 were not carried out.²⁹⁶ The Secretariat did not locate information on any Provincial Policy Committee discussions regarding these reductions in funding levels.²⁹⁷ Regarding money avail-

292. *Ibid.*

293. MNR, Provincial Forest Policy Committee – Summaries of Discussions, 20 April 1998 – 21 June 2005.

294. MNR, *Forest Operations and Silviculture Manual*, 1st ed. (Ontario: Queen's Printer, 1995) at 14.

295. 2000 Report on Guidelines Review at 84.

296. See Rob Steedman *et al.*, "Scientific Evaluation of Ontario's Forest Management Guidelines for Fish, Moose, and Tourist Habitat, 1988-1998, or 'Trust Me: I'm an Adaptive Government Scientist'," in G. Blake MacDonald *et al.*, *Adaptive Management Forum: Linking Management and Science to Achieve Ecological Sustainability* (Proceedings of the 1998 Provincial Science Forum, Science Development and Transfer Series) (Ontario: Queen's Printer, 1999) at 37. See also Environmental Commissioner of Ontario, "Ontario Regulation 482/95 and the *Environmental Bill of Rights: A Special Report to the Legislative Assembly of Ontario*" (1996), online: Environmental Commissioner of Ontario <<http://www.eco.on.ca/english/publicat/sp01.pdf>> (date accessed: 29 November 2005).

297. But see MNR, Provincial Forest Policy Committee – Summary of Discussions (18 May 2000) at 5-6: "[Name deleted] provided an update of the PFTC's (Provincial Forest Technical Committee) work, focusing on the *Review of Guidelines* report. He

able for research, the Committee discussed using money from one of the province's forestry trust funds²⁹⁸ to pay for research needs associated with enhanced forest productivity objectives.²⁹⁹ A special purpose account established under Ontario's *Fish and Wildlife Conservation Act* to direct all fines, fees and royalties (including revenue from hunting and fishing licenses) paid under that act toward "the conservation or management of wildlife or fish populations or the ecosystems of which those populations are a part" and/or matters "related to the activities of people as they interact with or affect wildlife or fish populations" was not discussed by the Committee.³⁰⁰

noted that it will take some time to reach approval, and implement, and that not all expectations will be met by the review. The final report is due for May 31, 2000 and PFPC plans to develop their recommendations on June 15th. A straw dog is being developed. [...] Members found the committee reports most interesting. PFPC (Provincial Forest Policy Committee) may want to give the guideline review more consideration."

298. See [borealforest.org](http://www.borealforest.org/index.php?category=ont_nw_forest&page=management); online: <[borealforest.org](http://www.borealforest.org/index.php?category=ont_nw_forest&page=management)> <http://www.borealforest.org/index.php?category=ont_nw_forest&page=management> (date accessed: 14 December 2005), stating that the CFSA "[...] provides for the establishment of the Forestry Futures Trust and the Forest Renewal Trust. Each trust is funded by monies generated by the Ontario forest industry. The Renewal Trust is used to carry out forest renewal work by companies on areas which they have recently harvested. Projects funded by the Forestry Futures Trust focus on improving future wood supply. Eligible projects fall into three categories: stand improvement, remedial (for example recently burned areas), and preventative (forest areas that for example are susceptible to insect infestation). The five-person Committee that reviews applications and approves funding functions at arms-length from the government. Chaired by Dr. John Naysmith of Lakehead University, the Forestry Futures Trust's annual income is in the order of \$8 to \$10 million."
299. MNR, Provincial Forest Policy Committee – Summary of Discussions (11 September 2003) at 2-3 and (9 December 2003) at 4. See also art. 13 of the *Ontario Forest Accord*.
300. See debates of the Legislative Assembly of Ontario regarding Bill 139, *An Act to promote the conservation of fish and wildlife through the revision of the Game and Fish Act*, 9 June 1997; 26 November 1997; 8 December 1997; and 18 December 1997, online: Legislative Assembly of Ontario, Hansard <<http://www.ontla.on.ca/hansard/index.htm>> (date accessed: 14 December 2005); and Ontario, Office of the Provincial Auditor, *1997 Annual Report* at 327-28: Exhibit One – Value for Money Audits and Reviews and Special Audits Conducted in 1997/98, Special Audits, Ministry of Natural Resources, Report on Fish and Wildlife Special Purpose Account; Ontario, Office of the Provincial Auditor, *1998 Annual Report* at 172: "Ministry of Natural Resources – Fish and Wildlife Program;" Ontario, *2000 Provincial Auditor's Special Report on Accountability and Value for Money*, "Chapter 4 Follow-up: Fish and Wildlife Program;" online: Office of the Auditor General of Ontario http://www.auditor.on.ca/en/reports_en.htm (date accessed: 14 December 2005). See also *Fish and Wildlife Conservation Act*, S.O. 1997, c. 41 at s. 85; *Heritage Hunting and Fishing Act*, S.O. 2002, c. 10 at s. 2(3)8 and "Heritage Hunting and Fishing Act," online: Peaceful Parks Coalition <http://www.peacefulparks.org/ppc/campaigns_hunt_heri.htm> (date accessed: 14 December 2005).

The Secretariat reviewed summaries of discussions from Provincial Technical Committee meetings for information on adaptive management in practice. Regarding pilot testing new guides, a meeting summary contained the following explanation, in connection with the issuance of a new osprey guide³⁰¹:

Agreed: Pilot testing was designed for recommendations for guidelines with greater uncertainty. The recommendations proposed for the osprey guide are reasonable and based on science, and there is not a need for pilot study to test the proposed guide. Revised osprey guide needs to include a paragraph that outlines the approach for effectiveness monitoring of the revised prescriptions.³⁰²

A discussion on pilot testing (and how it relates to guideline effectiveness monitoring and adaptive management) at an earlier meeting of the Provincial Forest Technical Committee was reported by MNR staff as follows:

There was a discussion on pilot testing and effectiveness monitoring. Pilot testing would include ecological impacts and economic feasibility. Ecological impacts can be addressed through the adaptive management process of guideline effectiveness monitoring and revision of the guides.

[MNR Staff – Name deleted] provided background information on the effectiveness of the eagle, osprey and heron guidelines. Harvesting close to the nests did not seem to impact the nests. Thus pilot testing for recommendations did not seem necessary.

[Senior MNR Staff – Name deleted] reminded the Committee of the legal wording³⁰³ on pilot testing – where feasible and with the advice of the PFTC (Provincial Forest Technical Committee), and for effectiveness monitoring – each guide must have a discussion.

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301. At a meeting of the Provincial Forest Policy Committee, it was stated: “[Name deleted] spoke to the new approach of revising a guide quickly, based on new science on osprey;” MNR, Provincial Forest Policy Committee – Summary of Discussions (21 June 2005) at 3.
 302. MNR, Provincial Forest Technical Committee – Summary of Discussions (12 May 2005) at 3. See also *2000 Report on Guidelines Review* at 84: “In contrast to silvicultural monitoring, one of the major observations we made during this study is that the level of effects and effectiveness monitoring is inadequate.”
 303. From Conditions 38(e) and (f) of Ontario’s Environmental Assessment Board 2003 Declaration Order renewing the Timber Class EA with a new set of terms and conditions, online: Ontario Ministry of the Environment <http://www.ene.gov.on.ca/envision/env_reg/er/documents/2003/RA03E0004.pdf> (date accessed: 25 November 2005).

In Ontario, on-the-ground monitoring by industry of the effects of logging on wildlife is not required, except when a sustainable forest license holder proposes to engage in activities in an area of concern that are different from the ones prescribed in the province's forest management guidelines.³⁰⁴ The Secretariat reviewed meeting summaries of the Provincial Technical Committee for information on the incorporation of research results from on-the-ground "exceptions monitoring" programs during review of forest management guides. It found one reference thereto, in connection with the review of the 1983 osprey guide.³⁰⁵ The summary of discussions states "[e]xceptions monitoring results were discussed briefly but not otherwise used for guide review."³⁰⁶

Forest management planners provide feedback on forest management guides and request guidance from MNR. MNR provides additional direction and interpretations of guides in "Interpretation Notes" and "Q & A" (Questions & Answers) without consulting the Provincial

304. FMPM 1996 at A-133.

305. MNR, Provincial Forest Technical Committee – Summary of Discussions (12 May 2005) (draft) at 2: "[Name deleted] provided the context for the guides, science and proposed changes. He began with the issues and rationale for the 1983 osprey guide that was addressing a dramatic decline in osprey populations in the 1950's-70's. He outlined the guides and parameters but commented that there wasn't much science behind the original recommendations. The osprey population increased after DDT was banned and is now widespread, healthy and no longer a 'threatened' species. He showed that disturbances such as recreation can also have an effect on ospreys; but they have proved to be remarkably adaptable. [Name deleted] discussed a retrospective study that documented the impacts of roads and various forest management activities on ospreys in Ontario (sample of 150 nests) – there was no detectable effect of any activity on long term reoccupancy or productivity. However, this study did not document the potential effects of disturbance during the summer on nesting during the year of the activity – the literature is somewhat equivocal but suggests that there can be 'in year' effects. Osprey do not seem to be particularly sensitive to roads except when roads are associated with other sources of human disturbance. [Name deleted] described the recommended changes to the buffer zone guidelines along with proposed harvesting restrictions. [...] [Name deleted] showed how the recommendations outlined by [name deleted] have been incorporated into a revised guide following the proposed PFTC model of science into guides [...] [Name deleted] asked the Committee if they had met the conditions of the Declaration Order 38 (d, e, f) for revising a guide. Information from the exceptions monitoring program was discussed briefly but was not used for the study." The Secretariat sought to obtain a copy of the proposed "model of science into guides" referenced above, but was told that there is no formal model; pers. comm. with David Euler, 6 December 2005.

306. MNR, Provincial Forest Technical Committee – Summary of Discussions (12 May 2005) (draft) at 2.

Technical Committee.³⁰⁷ At a Provincial Technical Committee meeting, it was explained:

When changes result in an Interpretation Note or a Q & A, these are transferred through training sessions. These decisions are made by the Forest Policy Section.³⁰⁸

The summary of discussions for the meeting then states:

Suggestion: This type of decision could be brought to PFTC (Provincial Forest Technical Committee).³⁰⁹

Implementing adaptive management through forest management planning is expensive and time-consuming.³¹⁰ At times, it also results in errors due to limitations of computer models or incomplete source data.³¹¹ MNR has explained that it does not monitor the effectiveness of any forest management planning software or manuals other than the guides for which monitoring is prescribed by the Timber Class EA:

There is no effectiveness monitoring program (in terms of what is required by the Forest EA Declaration Order) established for the SFMM (Strategic

307. Pers. comm. with David Euler, 6 December 2005. See e.g. MNR, "FMP Notes Number 1A – Old Growth" (9 December 2004) (Category: Interpretation; Status: Final), and MNR, "Forest Management Guidelines for the Provision of Marten Habitat (Interpretation Note)" (30 September 2004).

308. MNR, Provincial Forest Technical Committee – Summary of Discussions (20 October 2004) at 2.

309. *Ibid.*

310. See Westwind, "Forest Management Plan for the French-Severn Forest, Parry Sound District, Southcentral Region, O.M.N.R., for the 20-year period from April 1, 1999 to March 31, 2019" at 12: "Ideally, planning allocations should have been an iterative process that involved running the habitat model to determine where the areas of preferred habitat are, establishing tentative allocations which avoid critical habitat areas, then re-running the model to determine the impact on habitat projections, revising the allocations where possible and running the model again. In addition, many of the areas of preferred habitat for the three species being modeled will overlap, and if time had allowed, an effort would have been made to identify these areas (easily done in ArcView) to avoid allocating in them. This would have been particularly important for species that do not have critical habitat elements mapped and identified such as pileated woodpeckers and marten and some components of moose habitat such as late winter habitat. Unfortunately, this did not end up being possible due to time constraints. Another consideration which makes it infeasible to be doing this frequently is that producing a shapefile with the planned allocations is very time-consuming and expensive." See also G. Baskerville, "Implementation of Adaptive Approaches in Provincial and Federal Forestry Agencies" (paper presented at the 'Environmental Policy Seminar,' International Institute for Applied Systems Analysis, Laxenburg, Austria, June 18-20, 1979).

311. See Appendix 6.

Forest Management Model) wildlife habitat matrix, other components of the Strategic Forest Management Model or the Forest Management Planning Manual. This doesn't mean that species identified through the habitat matrix have not, or will not, be considered through the guide effectiveness monitoring programs developed in response to our work to overhaul the suite of forest management guides.³¹²

5.3.4.2 Emulating natural disturbance patterns

Under Ontario's system of forest management guides, the primary means for protecting wildlife from potential adverse effects associated with logging has been to plan to maintain representative distributions of habitat for featured and indicator wildlife species across FMUs over time. As a result of past planning efforts, some FMUs contain landscapes in which habitat is distributed in a "checkerboard" of alternating intact and clearcut blocks.³¹³ This approach to logging was based on a featured species guideline for moose that sought to address that species' predilection for forest edge (grazing in a clearing and then taking shelter in the forest).³¹⁴ Regarding habitat type, clearcut logging resulted in forest conversion from softwood to hardwood species in some areas.³¹⁵ In addition, Ontario's original featured species guidelines focused on species (such as moose and deer) that thrive in early successional (or post logging) habitat, which is characterized by young trees. In 1994, the Environmental Assessment Board required the development of guidelines for two species associated with late successional (or old growth) habitat: pine marten and pileated woodpecker.

Ontario's forest management system is moving away from a focus on species-based planning guidance toward a more landscape-based approach, on the theory that if the forest can be logged and regenerated in a way that emulates the scale and pattern of deforestation and reforestation resulting naturally from forest fires,³¹⁶ then ecosystem balance

312. E-mail from [Senior Staff – MNR] to David Euler (23 June 2005) Re: Effectiveness monitoring.

313. See Environmental Commissioner of Ontario, *2001/2002 Annual Report* (Ontario: Queen's Printer, 2002) at 50.

314. W. Robert Watt & W. Robert Parton, "Applying the Edge: Area Ratio to Habitat Management" (MNR Northeastern Science and Technology Technical Note 001, August 1992), online: MNR <<http://nesi.mnr.gov.on.ca/spectrasites/internet/nesi/media/documents/main/netn001.pdf>> (date accessed: 24 November 2005).

315. See Sierra Club of Canada, "The State of Ontario's Forests: A Cause for Concern" (2002) at 5, online: Sierra Club of Canada <<http://www.sierraclub.ca/national/programs/biodiversity/forests/state-of-the-forests/scc-ontario-forests.pdf>> (date accessed: 12 December 2005).

316. Ontario, "Policy Framework for Sustainable Forests" (6 April 1994), s. 3.1 "Principles for Sustaining Forests: [...] – Forest practices, including all methods of harvest-

may be maintained, since plant and animal species have adapted to periodic catastrophic fire events and logging will, in part, counterbalance the effects of fire control activities that are carried out for social and economic reasons.³¹⁷

Regarding habitat distribution, under Ontario's *Forest Management Guide for Natural Disturbance Pattern Emulation*,³¹⁸ efforts are being made to make post-logging landscapes more closely resemble post-fire scenarios (large barren areas with stumps, logging debris and islands of trees left standing; a strong emphasis on the use of prescribed burns to simulate chemical processes associated with forest fires; creation of irregular forest edges; and large intact areas of forest left to provide "forest interior habitat" for those species associated with that type of habitat).³¹⁹ There is also a sense amongst forest management planners that much of the forest within the AOU needs to be "normalized" through logging to counteract the effects of fire control (forest getting "too old") and to remove the checkerboard appearance of the landscape, and that species-specific management guides that prevent logging in certain areas may have the effect of unfairly prioritizing species conservation over timber supply on some management units.³²⁰ In addition, there is con-

ing must emulate, within the bounds of silvicultural requirements, natural disturbances, and landscape patterns." See also s. 2(3) of the CFSA: "The Forest Management Planning Manual shall provide for determinations of the sustainability of Crown forests in a manner consistent with the following principles:

1. Large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved.
2. The long term health and vigour of Crown forests should be provided for by using forest practices that, within the limits of silvicultural requirements, emulate natural disturbances and landscape patterns while minimizing adverse effects on plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values."

317. Timber Class EA Decision and Reasons for Decision at 159.

318. (Version 3.1) (November 2001) (Ontario: Queen's Printer, 2002).

319. *Ibid.*

320. See e.g. "Forest Management Plan for the Brightsand Forest, Thunder Bay District, Northwestern Region, MNR, Bowater Pulp and Paper Canada Inc. for the twenty year period from April 1, 1999 to March 31, 2019" at 87: 2.3.2.3.2 *Management Restrictions and Impacts of the Caribou Mosaic on Fibre Supply*: "The application of the caribou habitat mosaic restricts the ability to regulate and 'normalize' the forest. To normalize the Brightsand Forest, the goal is to harvest as much older wood as possible ('oldest first principle'), while leaving some stands to be 'stored on the stump' for harvest in later terms. It is recognized that harvesting using the 'oldest first principle' is limited by operational and economic factors, as well as modeling considerations. Generally, the caribou habitat mosaic restricts harvesting operations to within the A Blocks and to outside the mosaic area during the next twenty years (some harvesting is permitted in by-passed areas and reserves adjacent to recent cutovers for this five year term to minimize moose habitat and encourage caribou

cern that forest management direction which seeks to ensure species protection through specific habitat prescriptions may negatively affect ecological balance if it is not consistent with simulating a post-fire landscape.³²¹ For example, not logging in riparian buffer areas (which are intended to protect fish habitat) may be unnatural.³²² Federal and provincial scientists studying songbird diversity in riparian and upland areas in northeastern Ontario have observed that “a greater understanding of the importance of riparian habitats to songbird communities is needed if we are to maximize the effectiveness of these regions for conserving avian biodiversity in the boreal mixedwood forest.”³²³

The Provincial Technical Committee faced this issue when Ontario was developing new forest management guidelines for the protection of fish habitat in 2001. An MNR employee explained the compromise

habitat). However, from a wood supply perspective, the mature and over mature timber in the caribou mosaic deferral blocks will continue to age and deteriorate before they can be harvested. This results in additional inoperable areas, further reductions in the future wood supply, and an imbalanced age class structure is maintained on this forest because of the large proportion of area in E Blocks.” *Ibid.* at 84: “The forest industry remains concerned that the final decisions regarding harvest allocations on the Brightsand Forest tend to be weighted toward caribou management at the expense of the forest based industry.”

321. J.M. Landstrom & R.S. Rempel, “Riparian Disturbance Rates in Natural and Managed Landscapes of the Boreal Forest” in Proceedings of the Sustainable Forest Management Network Conference; Advances in Forest Management: From Knowledge to Practice (13-15 November 2002, Edmonton, Alberta) at 350: Abstract. “The goal of riparian (shoreline) management is to protect water quality, fish habitat and biodiversity. The *Crown Forest Sustainability Act* (1994) requires that forest management emulate natural disturbance patterns. However, the *Federal Fisheries Act* calls for the protection of fish habitat to have priority in areas where forest operations may affect lakes or streams. The *Timber Management Guidelines for the Protection of Fish Habitat* (MNR 1988) were developed to help managers plan forest operations in accordance with the *Federal Fisheries Act*. These guidelines prescribe 30 to 90 m shoreline management areas around most streams and lakes in which harvesting and silviculture activities are modified for the protection of the stream and shoreline values. Although shoreline management areas are intended to protect shoreline areas they may be creating forests of unnatural composition and structure. Wildfire does not follow the boundaries of shoreline management areas and therefore may result in different shoreline disturbance rates than harvesting. [...] The goals of this project are to provide scientific support for changes to riparian area management policy, to provide information about the natural range of variation in riparian disturbance rates and to promote better and more defensible decisions regarding shoreline management for natural disturbance emulation.”

322. *Ibid.*

323. Erin Mosley, Stephen B. Holmes and Erica Nol, “Songbird diversity and movement in upland and riparian habitats in the boreal mixedwood forest of northeastern Ontario,” *Can. J. For. Res.* [forthcoming in 2006] at lines 46-48.

reached between emulating natural disturbance patterns and specifically protecting fish habitat by retaining riparian tree buffers:

- Forest management activities can occur in the shoreline of lakes under the proposed guidelines, consistent with the Fisheries Act, provided several protection measures are followed.
- While considering that fires can burn to the shoreline, these guidelines have taken the approach that the temperature should be maintained and therefore shade should be retained.³²⁴

Logging in riparian areas can trigger a federal environmental assessment, which in turn would require a consideration of logging impacts on migratory birds as part of the assessment of the environmental effects of the logging activity.³²⁵

Regarding habitat type, there is ongoing research regarding whether species associated with old growth forests actually require old growth forest habitat, or whether they simply require certain characteristics typically associated with old growth forests, such as dead and downed coarse woody debris.³²⁶ The answer to this question could

324. MNR, Provincial Forest Technical Committee – Summary of Discussions (28 February 2001) at 3. See also MNR, “Forest Management Guide for Natural Disturbance Pattern Emulation (Version 3.1)” (November 2001) at 16: “Disturbances in Areas of Concern (AOC)” “The planning of forest management activities involves ensuring that forest values sensitive to forest disturbance are adequately protected. The areas around these sensitive sites are called AOCs and prescriptions are developed within these AOCs to protect the identified value. As an example, the identified nesting sites of bald eagles, great blue herons and ospreys are always protected with no harvest and restricted harvest buffers to ensure that disturbance to the nesting sites is minimized. If the coarse-filter attributes of the *Natural Disturbance Pattern Guide* will not adequately protect these nesting sites, the species-specific fine-filter guidelines will need to be applied (see Figure 2) [not reproduced herein].”

325. Under s. 46 of the *Inclusion List Regulations*, SOR/94-637 adopted pursuant to the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, an activity involving “harmful alteration, disruption or destruction of fish habitat by means of the removal of vegetation in or adjacent to a water body that requires the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act” is considered to be a “project” for which an environmental assessment must be carried out under the *Canadian Environmental Assessment Act*.

326. MNR, Provincial Forest Technical Committee – Summary of Discussions (20 June 2002) at 4: “Marten Habitat Research Update – [MNR Senior staff – Name deleted]” “[Name deleted] described the work done to date on marten as an indicator, and whether martens actually do require old growth to sustain a healthy population. It was observed that climate and weather also had a strong influence on marten populations, perhaps more than stand age in some areas. There is an assumption that areas do not become sources for marten until the stands are 60 years old. The studies may suggest that 60 years might be too high a threshold – maybe 40 years would be

determine how long trees are left standing before they are logged, since it may be found that it is possible, through silvicultural treatments, to create forest conditions in a younger forest that resemble forest conditions that would occur much later in a forest aging naturally.³²⁷ This is important from a logging perspective, because trees left to grow too old lose their value as merchantable timber. From a wildlife perspective, the question is whether shortened “rotation times” can sustain wildlife populations at historic levels, based on the amount, type and distribution of habitat available on the landscape at any given time.³²⁸

5.3.4.2.1 *The acceptable bounds of natural variation*

In the forest management plans identified by the Submitters, for each indicator species selected by the planning team, a “yield curve” was produced showing how habitat amount for that species would change on the FMU over time, as the selected management alternative

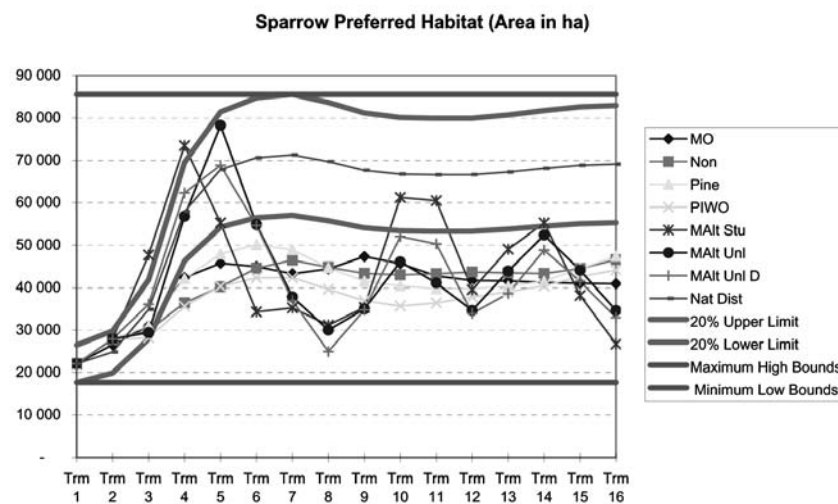
sufficient. This would increase the available wood supply. There was a question on whether the research addresses whether there is adequate habitat protected. The study may infer that the indicator species approach may not be the best guide. It may also suggest that other species are better indicators. If marten is not a good indicator species for old growth, this does not mean that there isn't a need for old growth. The study may show that core areas are still important for other values and species. A range of ages and core areas is likely to be required.” See also MNR, “FMP Notes Number 1A – Old Growth” (9 December 2004) at 4: “The old growth policy does not provide direction on whether old growth stands managed under the shelterwood system can contribute towards achievement of the old growth indicator in Figure A-5. Silvicultural prescription advice is found in the FMPM. The following is offered as a possible option. The planning team may wish to categorize stands after the first pass of a 3 or 4 pass system (where old growth characteristics are retained) as providing functional old growth for those species that desire it. Since this option is not the same as old growth defined in the definition report, planning teams should discuss this with their regional specialists;” and at 5: “Silvicultural ground rules reflect the management techniques for providing structural attributes associated with old growth in managed stands.”

327. See T.P. Sullivan *et al.*, “Old-Growth Attributes in Intensively Managed Forests: Integration of Stand Productivity with Mammal Diversity” in Proceedings of the Sustainable Forest Management Network Conference; Advances in Forest Management: From Knowledge to Practice (13-15 November 2002, Edmonton, Alberta).

328. See MNR, *State of the Forest Report (2001)* (Ontario: Queen's Printer, 2002) at 4-84: “Area Harvested and Average and Maximum Size of Clearcuts.” See also MNR, “Habitat Management Guidelines for Warblers of Ontario's Northern Coniferous Forests, Mixed Forests or Southern Hardwood Forests” (1984) at 20: “On a short term basis, warblers requiring mature forests will tolerate little more than selective cutting of a few trees. They can be accommodated only through leaving large patches of forest uncut, or by setting long rotation times so that there are always large areas of mature to old growth stages available in any management area if clearcutting is the procedure followed.”

was implemented. This “curve” was then compared to another curve representing a “natural benchmark scenario,” which is an estimate of how much habitat would be available for that species in the FMU over time in the absence of human intervention, an estimate based loosely on modeling fire return intervals. A management alternative is considered acceptable if preferred habitat amount for the species resulting from the implementation of the management alternative doesn’t fall more than twenty (20) percent below the lowest amount that would be available in the “natural disturbance scenario.”³²⁹

Figure 6. Yield curve showing projected reductions in sparrow habitat over the course of 160 years under various forest management alternatives relative to a natural benchmark scenario³³⁰



329. See e.g. MNR, “Landscape Analysis & Assessment Paper for Southcentral Region Management Units – 2004 SCR FMP Teams” (draft) (30 January 2002) at 8-9: “Bounds of Natural Variation:” “The natural benchmark, or ‘NULL’ scenario, is supposed to portray forest development over time when subjected to forces of natural disturbance and succession. The results from the SFMM NULL cases are used to establish upper and lower limits of sustainability for assessing Management Alternatives. To create the upper and lower acceptable levels for the four non-spatial testing categories, construct two lines that are +20% of the maximum value (upper level) and -20% of the minimum value (lower level) of the average Natural Benchmark Scenario (see figure 7) [not reproduced herein].”

330. MNR, “Forest Management Plan for the Temagami Management Unit, North Bay District, Northeast Region, for the 20-year period from April 1, 1999 to March 31, 2019.” See explanation, *supra* note 329.

MNR scientists have stated that under an ecosystem approach to forest management, human activities are meant to be “at least impact-neutral,”³³¹ and it is MNR policy to “ensure that no species declines on a provincial scale because of forest management activities.”³³² However, because there are no regional or provincial targets for wildlife habitat other than the requirement, in Table A-2 of the 1996 *Forest Management Planning Manual*, that the chosen management alternative not threaten preferred habitat at the eco-regional scale, current MNR direction on emulating natural disturbance scenarios allows forest management planners to select management alternatives that will lead to a long-term reduction in the amount of preferred habitat for migratory birds included as indicators of sustainability in forest management planning in Ontario.

5.3.5 *Population objectives for wildlife*

There has been debate regarding whether population objectives for wildlife species (or habitat objectives as surrogates for population objectives) should be incorporated into forest management planning in Ontario. In the Timber Class EA Reasons for Decision, in 1994, the Environmental Assessment Board made the following finding:

Also it is clear to us that today there is insufficient information about the cause and effect linkages between specific wildlife habitat and population levels in Ontario to move into management for quantified wildlife habitat objectives as basic minimum requirements in timber management planning. [...] We believe that the mere quantification of one forest value (i.e. timber) gives it neither priority nor elevates it in importance over the others for which we are providing protection. We disagree that the key to elevating other values is to set “objectives” for them. The *Environmental Assessment Act* provides for equal protection of all forest values and we believe that non-timber values share equally the protection of the Act with timber. Simply setting targets as objectives for some or one of them does not change this.³³³

Certainly Dean Gordon Baskerville indicated that he did not recommend wholesale change in MNR’s current management approach. After describing his preference for a management process using quantitative predictive models more frequently than MNR does now, Dr. Baskerville stated he would not replace the guidelines approach immediately.

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331. Paul A. Gray & Robert J. Davidson, “An Ecosystem Approach to Management: A Context for Wilderness Protection,” (2000) *USDA Forest Service Proceedings RMRS-P-15*, Vol. 2 at 60.
 332. MNR, *Forest Operations and Silviculture Manual*, 1st ed. (Ontario: Queen’s Printer, 1995) at 14.
 333. Timber Class EA Reasons for Decision and Decision at 289.

MNR has indicated its appreciation of the need to move towards integrated resource management generally and as we discuss in Chapter 11, Condition 107 prevents MNR from backsliding on this commitment. We also note that this commitment extends to the continuing review, development and improvement of implementation manuals.

At the outcome of a Timber Class EA-mandated review of the operation and effectiveness of Ontario's forest management guides conducted in 2000, the authors stated:

In fact, it is difficult to gauge whether the level of protection afforded is sufficient when the objectives stated in the guides are insufficient. For example, the moose guide states:

The purpose of the guidelines is to assist resource managers in maintaining or creating through timber management the diversity of age classes and species of vegetation that provide habitat for moose.

Rempel, Elkie *et al.* (1997) expressed the impacts of the different disturbance and access scenarios in terms of moose density, which does not appear to be the basis that the moose guideline authors would use to evaluate the success of the guide. However, Rempel, Elkie *et al.*'s conclusions are stated in the terms that we feel most people would think appropriate since we think that many people's ultimate interest is not to create moose habitat, but to maintain moose populations at some level while providing hunting opportunities. If this is so, then it is not clear whether the guidelines are supporting the attainment of these overriding objectives. Furthermore, it is not clear what these over-riding objectives are. To be able to assess whether the moose guidelines are effective, it is necessary to answer the following questions:

- What improvements in moose habitat, as measured by increase in carrying capacity or number of hectares of high quality habitat (or another appropriate quantitative measure), are the moose guidelines intended to produce?
- What is the expected impact of applying the guidelines on long-term average moose populations?
- How much of the potential increase in populations will be translated into hunting success?

It is not our [intention] to single out the moose guide for this sort of criticism; similar questions can be asked with regard to most other values. However, these questions cannot be answered even for moose, about which relatively more is known than any other forest based species. While Ontario had, at one time, a provincial moose population goal, it seems that this has become largely irrelevant now as a policy driver.

The foregoing suggests some of the limits of forest management in affecting population levels – management affects both habitat and access but populations of many species are also affected by hunting and trapping pressure, and natural cycles. This suggests a need to integrate the management of exploitation with management of habitat and access in order to develop goals, objectives and strategies to manage many wildlife populations. The potential risk for the forest industry associated with the present, unintegrated and goal-less system is that the industry will be largely blamed if the population of a species should begin to decline, even if the decline is caused by non-habitat related factors. Where wildlife is concerned, we suggest that effects and effectiveness monitoring should be concerned with both the provision of habitat and population levels (as discussed more fully shortly).³³⁴

Ontario is working on the development of a series of new forest management guides, with a particular emphasis on providing direction to forest planners at ecologically-appropriate planning scales: landscape, stand and site.³³⁵ There has been an expectation that the review and consolidation of Ontario's forest management planning guides will free up wood supply to mitigate, in part, wood supply lost through creation of new parks and protected areas in the AOU.³³⁶

At the landscape level, work continues on deciding whether and how to strike a balance between emulating natural disturbance patterns and attaining predefined wildlife habitat and/or population objectives.³³⁷ One example is the principle of "no net loss," a guiding principle

334. *2000 Report on Guidelines Review* at 85.

335. See *Forestry Guidelines Review*, online: Wildlands League <<http://www.wildlandsleague.org/forguide.html>> (date accessed: 24 November 2005).

336. A review of Ontario's forest management planning guidelines was one of the commitments made by MNR in the March, 1999 *Ontario Forest Accord* (s. 27). On 15 June 2000, at a meeting of the Provincial Forest Technical Committee, an MNR employee noted that "[w]hile it is anticipated that the review will lead to increased effectiveness and efficiencies, it is not yet a quantitative mitigation tool, or one that can direct other mitigating initiatives such as intensive forest management;" MNR, Provincial Forest Technical Committee – Summary of Discussions (15 June 2000) at 6. At the October 2000 meeting of this committee, the following was stated: "Still an expectation that the guideline review will produce more wood volume;" MNR, Provincial Forest Technical Committee – Summary of Discussions (19 October 2000) at 2.

337. See MNR, Provincial Forest Technical Committee – Summary of Discussions (20 October 2004) at 8: "[MNR employee] provided some posters that illustrated the outcome of forest management simulation modeling for the Lake Nipigon Forest comparing the forest without landscape guides, with all the current guides and with NDEPG (Ontario's *Forest Management Guide for Natural Disturbance Pattern Emulation* (Ontario: Queen's Printer, 2004) only. The results compared harvest and biodiversity indicators. He showed how they are beginning to develop effectiveness monitoring. A Workshop will be used to compare alternative policies

in federal policy on fish habitat³³⁸ and wetlands.³³⁹ The concept implies that there is a baseline amount of habitat (usually present or historic) and that activities will not be allowed to result in a reduction of that baseline amount, measured in terms of productive capacity³⁴⁰ (for fish habitat) and function (for wetlands). This is achieved – depending on the circumstances – by not doing the activity, altering the activity, or creating new fish habitat productive capacity or wetland functions elsewhere.

In a planning system that seeks to emulate natural disturbance patterns, “no net loss” is interpreted by reference to a fluctuating amount of habitat that a computer model predicts will be available on the landscape over time in the absence of human intervention.³⁴¹ In

(no guides, all current guides, NDPEG only, etc.) to the natural landscape pattern. In the workshop expert opinion will be used to assign probabilities to the model outcomes to help focus effectiveness monitoring and help develop efficient direction in the guide.”

338. Fisheries and Oceans Canada, “Policy for the Management of Fish Habitat” (1986) at s. 2.2.1, online: Fisheries and Oceans Canada <http://www.dfo-mpo.gc.ca/can_waters-eauxcan/infocentre/legislation-lois/policies/fhm-policy/index_e.asp> (date accessed: 24 November 2005).
339. Government of Canada, “The Federal Policy on Wetland Conservation” (1991): “Goals” “[...] No net loss of wetland functions on all federal lands and waters,” online: Government of Canada Depository Services Program <<http://dsp-psd.comunication.gc.ca/Collection/CW66-116-1991E.pdf>> (date accessed: 24 November 2005). Environment Canada’s, “Environmental Assessment Guideline for Forest Habitat of Migratory Birds” (1998) at 15 states that the key to maintaining the diversity of migratory birds found on the landscape prior to logging is “retaining a forest landscape that has age-classes whose structure, function, and size most closely approximate the full range of seral stages found under a natural disturbance regime.” At the same time, it states that to maintain migratory bird habitat in forests, a sustainable forest management plan must, among other things, “ensure no net loss of wetland functions in forests [...]” *Ibid.* at 16.
340. See Michael L. Jones *et al.*, “Assessing the ecological effects of habitat change: moving beyond productive capacity,” (1996) 53 *Can. J. Fish. Aquat. Sci.* (Suppl. 1) 446.
341. Westwind, “Forest Management Plan for the French-Severn Forest, Parry Sound District, Southcentral Region, for the 20-year period from April 1, 1999 to March 31, 2019” at 120. See also instructions from Ontario’s *Forest Management Guidelines for the Provision of Pileated Woodpecker Habitat (Version 1.0)* (Ontario: Queen’s Printer, 1996) at 11. “5.2 Landscape Level Guidelines” “Landscape level guidelines will be incorporated into FMPs using a habitat supply analysis (HSA) approach (see Naylor 1994b). The specific steps recommended follow those outlined in the Forest Management Planning Manual: Step 1. Identify the ecoregional context. Review ecoregional analyses of pileated woodpecker habitat supply and any broad ecoregional objectives or direction. Step 2. Based on information from step 1 and a consideration of other forest objectives, set specific MU objectives for the supply of pileated woodpecker habitat. For example, if the ecoregional analysis suggests a long-term decline in habitat and the MU contains a large proportion of the ecoregion’s preferred habitat, an objective of no net loss of preferred habitat might

practice, a forest management planner has applied the concept as follows in developing his own objective for pileated woodpecker habitat:

3.3.1.3.3 Pileated Woodpecker Objective

- To protect preferred pileated woodpecker feeding, nesting and roosting habitat.

The preferred management alternative from SFMM suggests a very slight increase of 1.3% in the amount of preferred habitat over the next 20 years. This means that for each 5 year planning period, there could be about 0.5% increase in preferred habitat. Since [Ontario Wildlife Habitat Assessment Model] calculates that there is presently 177,878 ha of preferred habitat, the 20 year spatial habitat target therefore becomes 180,012 ha. The objectives for pileated woodpeckers focus on ensuring that there is no loss of their preferred habitat.

Strategies for Pileated Woodpecker – The objective will be met by:

- a) continuing to identify habitat values through inventory and assessment programs and ensuring that these values are considered in the forest management planning process; and by,
- b) ensuring that the total area of pileated woodpecker habitat is not allowed to fall outside the acceptable range for natural disturbance.³⁴²

As described above, under Ontario's forest management planning system, the "acceptable range for natural disturbance" includes a reduction in habitat amount of up to twenty (20) percent starting from the lowest amount of habitat expected to be available on the landscape within the next 160 years, based on computer modeling of natural disturbance sce-

be proposed. Step 3. Identify management alternatives. One alternative might be to provide a sustainable supply of timber products while ensuring the area of habitat does not fluctuate through time by more than a specified amount. Step 4. Use SFMM to forecast the effect of each management alternative on the long-term supply of pileated woodpecker habitat and other plan objectives. Step 5. Identify the preliminary preferred management alternative considering, among other objectives, those set for pileated woodpecker habitat in step 2. Step 6. Use the PWPHSM (pileated woodpecker habitat supply model) to identify eligible stands that represent preferred habitat for pileated woodpeckers. Use this information when making the initial allocation of stands for harvest (e.g., see Appendix 3) [not reproduced herein]. Step 7. Input planned depletions into the PWPHSM and forecast impact of the preliminary preferred management alternative on habitat supply. Step 8. Based on results from step 7, modify stand allocations as necessary. Appendix 3 provides a simple example of how HSA can be used to manage the supply of pileated woodpecker habitat during development of a FMP."

342. *Ibid.*

narios.³⁴³ MNR has stated that once the requirement to stay within the range of +/- twenty (20) percent of the “extremes” of the natural benchmark scenario is met, all management alternatives are “equal:” no preference will be given to a management alternative just because it most closely emulates the natural benchmark scenario.³⁴⁴

Computer models make assumptions about the ability of forest harvesting and silvicultural practices to emulate natural disturbance patterns, but required information on natural disturbance patterns is not yet available.³⁴⁵ There is disagreement in Ontario regarding the degree to which forestry is additive to forest fires or supplants forest fires (because fires are being put out).³⁴⁶ In addition, while the emphasis is on

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343. MNR has explained: “Plus or minus 20% of the Natural Benchmark Scenario represents a realistic set of acceptable levels given the natural variability and uncertainty associated with estimates of disturbance rates, succession rates, and post-succession transition rates;” MNR, “Landscape Analysis & Assessment Paper for South-central Region Management Units – 2004 SCR FMP Teams” (draft) (30 January 2002) at 12.
344. *Ibid.* at 13: “While Management Alternative 3 may be closer to the natural benchmark scenario, it would simply receive a ‘pass’ and be counted the same as any other alternative that is acceptable.”
345. See Ontario Forest Research Institute, “An analysis of literature on natural fire disturbances in relation to Ontario’s Forest Management Guide for Natural Disturbance Pattern Emulation” (Ontario: Queen’s Printer, 2004) at i: “Overall, the published knowledge is not adequate to understand the stochasticity and variability in spatial patterns of fires and post-fire residuals associated with fire regimes in boreal and near-boreal forests.”
346. See MNR, *Forest Management Guide for Natural Disturbance Pattern Emulation (Version 3.1)* (Ontario: Queen’s Printer, 2002) at 3: “Showing movement towards a more natural frequency distribution of disturbance sizes (i.e. clearcut and fire ‘patches’ combined) is a requirement in forest management planning (see Page A-63, Forest Management Planning Manual FMPM). It is important to understand that in meeting this requirement, planning teams will allocate the harvest in such a way as to complement, not supplant, the historical natural fire size frequency distribution. For example, if a particular region has had a number of recent large fires, large clearcuts normally would not be planned.” See also S.R.J. Bridge, “Spatial and Temporal Variations in the Fire Cycle Across Ontario,” *MNR Northeast Science and Technology Technical Report TR-043* (Ontario: Queen’s Printer, 2001); Abstract: “Estimates of the disturbance rate by wildfire enter into calculations of predicted wood and habitat supply used in Ontario’s forest management planning process. Inaccurate estimates compromise our ability to manage in a sustainable way and to predict sustainable harvest levels. Current estimates used by forest managers come from nonspatial data sets. Here, more accurate estimates are made using spatial data that recently became available in Ontario and more rigorous analysis techniques. Spatial patterns show a trend from shorter fire cycles in the northwestern part of the province to longer fire cycles in the northeastern and southern parts. The trend matches well with known climate and fragmentation trends across Ontario and into Quebec. The length of time period over which to estimate the fire cycle is

emulating disturbance *patterns* (rather than chemical *processes*) associated with natural disturbances such as fires, Ontario's Forest Management Guide for Natural Disturbance Pattern Emulation states: "[...] the importance of using prescribed burning as frequently as possible as a silvicultural treatment to better simulate what fire would do cannot be overemphasized."³⁴⁷ The Environmental Commissioner of Ontario has pointed out that the use of prescribed burns has dropped dramatically since the early 1990's,³⁴⁸ and at a meeting of the Provincial Policy Committee, an MNR expert on fire management commented that "[p]rescribed burns are useful but would need highly trained experts with knowledge of risks and liabilities. The Nakina tragedy with Junior Rangers was noted as being a large factor in the reduced number of prescribed burns. It is still a sensitive issue, and it would be difficult to gain acceptance."³⁴⁹

At the landscape level, road planning remains a concern as regards setting population objectives (or habitat objectives as surrogates for population objectives) for wildlife in a forestry context.³⁵⁰ That is because unlike natural disturbances, logging roads open the way for development pressure from other industries and provide access to the

also examined. Fire cycles are estimated by drawing data from a single, homogeneous time-since-fire distribution that spans the period from 1921 to 1995. This is a much longer period than has been used previously and produces estimates with considerably less variability between management units. The results of this study do not support the widely held belief that since 1950 fire suppression has reduced the average annual area burned within most of the area subject to forestry operations. This may have significant implications for forest management planning in Ontario."

347. *Ibid.* at 14.

348. Environmental Commissioner of Ontario, *2004/2005 Annual Report (Supplement)* (Ontario: Queen's Printer 2005) at 204: (Review of MNR's Forest Fire Management Strategy) "The ECO (Environmental Commissioner of Ontario) also is concerned with the minimal role that is outlined in the strategy for the usage of prescribed burns. [...] In 1990/1991, MNR stated that 6,166 ha of Crown land had undergone prescribed burns. A decade later, the ministry reported an almost ten-fold decrease to only 711 ha of Crown land. This trend has been accompanied by a decrease in the number of prescribed burns in the Area of the Undertaking for commercial forestry and many years have not even had a single prescribed burn occur."

349. MNR, Provincial Forest Policy Committee – Summary of Discussions (16 November 2000) at 4.

350. See Wildlands League & Sierra Legal Defence Fund, *The Road Less Travelled? A report on the effectiveness of controlling motorized access in remote areas of Ontario* (Toronto: Global Forest Watch/Global Forest Watch Canada, 2003). See also Provincial Forest Technical Committee – Summary of Discussions (16 December 1998) at 3 and Provincial Forest Policy Committee – Summary of Discussions (9 December 2003) at 5-6.

land base for humans (and invasive species).³⁵¹ The attendant impacts on wildlife such as those associated with increased hunting and fishing pressure³⁵² are considered to be “confounding factors” that impact the ability to assess any short and long-term effects of logging on wildlife populations.³⁵³ In the absence of more information on the impact of these other factors on wildlife populations, it is difficult to hold the logging industry to account for achieving predetermined wildlife population objectives.³⁵⁴

On the other hand, modeling tools require objectives to be set for values included in planning. During a presentation on landscape guide development that was made to the Provincial Technical Committee in 2004, guide developers commented on the need for higher order direction as a precondition to the use of a landscape guide during forest management planning:

The Development Team has been working with the Blueprint straw dog and discussing what is possible at each scale from landscape to site with eco-section in between. [Name deleted] asked PFTC (Provincial Forest Technical Committee) for a process of apportioning direction to the FMU

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351. See Stephen C. Trombulak & Christopher A. Frissell, “Review of Ecological Effects of Roads on Terrestrial and Aquatic Communities,” (2000) 14 *Conservation Biology* No. 1, 18.
352. See Timber Class EA Reasons for Decision and Decision at 127: “On the issue of excessive hunting or trapping associated with forest roads, MNR said it usually prefers placing direct controls on wildlife harvesting, rather than using road closures or restrictions. MNR’s use of a moose tag quota system is unpopular with hunters and we received evidence from the OFAH (Ontario Federation of Anglers and Hunters) showing that the number of moose tags declined from 44,830 in 1984 to 34,215 in 1988 (trans: vol. 105, pp. 17682-83).”
353. In commenting on MNR’s draft Declaration Order for the extension of the Timber Class EA, Environment Canada stated in June 2002: “MNR recognizes that wildlife populations fluctuate as a result of many factors such as predation, weather, hunting, habitat, and disease, and that each of these factors varies with species, time and location (p. 156, p. 19). It is noted that ‘effects monitoring’ is accomplished through scientific studies that survey and record the effects of certain ‘operations’ on the ecosystem (p. 141, line 26). We recommend that MNR be required to design monitoring studies to specifically separate the effects of various forestry practices on migratory bird populations from effects due to other confounding factors. EC would like the opportunity to comment on studies designed to investigate the impact of forestry operations on migratory bird populations;” letter from Head, Environmental Assessment Section, Environment Canada – Ontario Region to Project Manager, Timber EA Renewal Project, Ontario Ministry of the Environment (17 June 2002) at 2.
354. *Ibid.*

scale. For example the most effective apportioning of marten habitat³⁵⁵ across an ecoregion may not be equal to all management units. How far does the landscape guide go with its direction.

This is a similar question to the land use planning process at similar scales and some meshing needs to occur. There may also be direction from other sources to local planning teams possibly with analytical teams at the right scale.

Unlike other guides with generic quantitative requirements, the landscape guide will provide a template that needs decisions before it can be applied at the forest management unit scale. The guide will provide some direction for appropriate application based on ecology, but does not consider the social and economic values.³⁵⁶

The outcome of the modeling process, for any given value, depends on whether the value is entered into the model as a “constraint” (model must achieve specific objectives for that value) or as a “target” (objectives are set for the value, but the model can strike a balance between achieving objectives for this value and other values).³⁵⁷ When a value (such as migratory bird habitat) is used only as an “indicator of sustainable forest management,” it is not entered into the model as a constraint or a target, but modeling results are assessed in light of requirements associated with the indicator value.³⁵⁸

355. A “featured” indicator species for old growth forests. See Timber Class EA Reasons for Decision and Decision at 390-91: “The evidence of Dr. Thomas and Dr. Euler indicates that adding featured species which require old growth, in addition to the existing ones which favour early successional stages of forest, will provide habitat for some of the other 30% of species. Specifically, pine marten and pileated woodpecker make good choices because there is a significant amount of information available, such as Dr. Ian Thompson’s work on the pine marten (trans: vol. 383, pp. 66143-50), so that guidelines can be prepared and put into use relatively quickly. We are therefore ordering in Condition 94 that these two species be added as featured species in the forest regions recommended.”

356. MNR, Provincial Forest Technical Committee – Summary of Discussions (28 April 2004) at 4-5.

357. See e.g. MNR, Provincial Forest Technical Committee – Summary of Discussions (16-17 January 2002) at 1, 3: “A Review of Selected Forest Management Guidelines with Respect to the Emulation of Natural Landscape Patterns: An assessment of Two Simulated Guideline Application Scenarios [...] Wood volume is a target (but not a constraint), and is held at the same figure for all management scenarios. Volume target was not achieved on all runs. It is possible to run the model with drivers other than wood volume such as caribou habitat. The current use of caribou habitat may be overly constraining the model after 40 years.”

358. See FMPM 1996, Table FMP-5, s. 5.3.3.2.3, above.

Witnesses speaking on behalf of MNR at the Timber Class EA hearings in the early 1990's commented on the need for making higher order decisions about values to be managed for:

Dr. Abraham and Mr. Kennedy also argued that biological diversity is affected by more than timber management, that MNR is in the process of developing a ministry-wide policy framework for biodiversity, and shouldn't be constrained by any terms and conditions mandated for timber management. MNR also argued that landscape management would require decisions to be made at management levels well above the forest management unit level (concerning which values to manage for, and what the objectives would be) before it could be used operationally in timber management planning (MNR Final Argument, p. 825).³⁵⁹

5.4 Whether nests of migratory birds were protected during logging identified by Submitters

The Secretariat inquired whether attempts were made to comply with s. 6(a) of the MBR during logging identified by the Submitters. The Secretariat began by examining the requirements of the forest management planning system in Ontario, and then reviewed FMPs identified by the Submitters.

5.4.1 Requirements of Ontario's forest management planning system

It is not clear whether compliance with s. 6(a) of the MBR is a requirement under the legal and policy framework surrounding the CFSA. MNR's *Independent Forest Audit Protocol* states:

The harvesting operations must be conducted in compliance with all current laws and regulations and in accordance with all the planning activities of the FMP and the AWS (Annual Work Schedule)³⁶⁰

and it instructs auditors as follows:

Select a sample of harvesting operations from those areas where operations have been conducted during the five-year period of the audit. [...] 1. Determine whether the harvest operations have been conducted in compliance with all laws and regulations. Assess whether the compliance plan and monitoring program have been followed.³⁶¹

359. Timber Class EA Reasons for Decision and Decision at 397.

360. MNR, "Independent Forest Audit Protocol (Draft)" (March, 2001) at A-27.

361. *Ibid.*

In addition, the Forest Resource Assessment Policy states:

Levels of forest use, including timber production, must be:

- Responsive to changes in environmental concerns, industrial demand and societal needs; and
- Practical to ensure that policy development and legal reform occur consistent with overarching federal and provincial laws and policies, within the context of existing and future priorities and fiscal and/or human resource capabilities (i.e. the reasonable relationship principle).³⁶²

On 15 January 1997, the Enforcement Section of MNR's Field Services Division issued Bulletin CFSA 005 entitled "Index to Non-CFSA Related Legislation Affecting Forest Operations in Ontario." Federal legislation included in this bulletin was the *Criminal Code* and the *Fisheries Act*. Also included in the list was Ontario's *Game and Fish Act*,³⁶³ which at s. 60 contained the following prohibition:

60. (1) Except with the written authority of the Minister and subject to such terms and conditions as he or she may impose, no person shall take a game bird by any means for education or scientific purposes.

Eggs and nests protected

(2) No person shall take, destroy or possess the eggs or nests of any game bird, except with the written authority of the Minister to take, destroy or possess the eggs or nests for educational or scientific purposes.

While the MBCA was not listed in the index to non-CFSA related legislation, nests of migratory game birds (protected under the MBCA) were protected under Ontario legislation that was included in the list of "legislation affecting forest operations in Ontario."

In 1999, the *Game and Fish Act* was replaced by Ontario's *Fish and Wildlife Conservation Act*, which provides, at s. 7:³⁶⁴

Nests and eggs

7. (1) A person shall not destroy, take or possess the nest or eggs of a bird that belongs to a species that is wild by nature.

362. MNR, *Forest Resource Assessment Policy* (Version 2) (Ontario: Queen's Printer, 2003) at 6. The Secretariat did not locate any information on the "reasonable relationship principle."

363. R.S.O., c. G.1.

364. S.O. 1997, c. 41.

Exceptions

(2) Subsection (1) does not apply to the nest or eggs of an American crow, brown-headed cowbird, common grackle, house sparrow, red-winged blackbird or starling.

Authorization

(3) Subsection (1) does not apply if the person has the authorization of the Minister.

Migratory birds

(4) This section does not apply to nests or eggs that are subject to the *Migratory Birds Convention Act, 1994* (Canada). 1997, c. 41, s. 7.

Consequently, since the coming into force of the *Fish and Wildlife Conservation Act*, nests of birds covered by the MBCA are no longer protected under Ontario legislation.

The Secretariat enquired into the administration of s. 7 of the *Fish and Wildlife Conservation Act* to determine whether it may result, indirectly, in the protection of nests of birds covered by the MBCA. In regard to the *Fish and Wildlife Conservation Act*, MNR's *Forest Compliance Handbook*³⁶⁵ states:

The Fish and Wildlife Conservation Act

Purpose

To provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters.

Policy

It is the policy of the Ministry that staff will be guided by the following procedure directives when considering compliance measures under the FWCA relative to forest operations activities in Ontario.

Any questions regarding the interpretation of the FWCA and/or any of the associated directives should be discussed locally and, if necessary directed through your District Enforcement Supervisor to Enforcement Section.

365. Revised March, 2000 (For Internal Use Only), s. IV.

The Enforcement Section of MNR's Field Services Division has a procedure dated 1 July 1999 entitled "Damage or Destroy Nests or Eggs" that is reproduced in the *Forest Compliance Handbook* and provides, in regard to s. 7 of the *Fish and Wildlife Conservation Act*:³⁶⁶

INFRACTION

A person unlawfully destroys, takes or possess [sic] the nest or eggs of a bird that belongs to a species that is wild by nature.

REMEDIES AND ENFORCEMENT	APPLICATION
<p>Sections 97(1), 102(1), 102(3) FWCA-Court Action</p> <p>Fine of not more than \$25,000, imprisonment of not more than 1 year, or both if convicted</p> <p>Fine of not more than \$100,000, imprisonment of not more than two years or both if the offence was committed for commercial purposes.</p>	<p>Utilize where a person has not exercised all due diligence to prevent the commission of the offence or the person honestly and reasonably believed the [sic] existence of facts that, if true, would render the person's conduct innocent.</p>

Also since 1999, MNR has a policy that provides as follows:³⁶⁷

The *Fish and Wildlife Conservation Act*, prohibits the destruction, taking or possession of nests or eggs of a species of bird which is wild by nature. There are three exceptions: if the species of bird are listed in Subsection 7(2) of the Act, if the person who takes, possesses or destroys the nests or eggs is authorized to do so by the Minister, or if the nest or eggs are those of birds that are subject to the *Migratory Birds Convention Act, 1994* (Canada). This section provides protection to a great number of birds including raptors and nongame birds.

This policy/procedure provides direction on the types of activities for which an authorization may be issued and the process for authorization.

PROGRAM DIRECTION

Subsection 7(2) of the Act exempts specific species of birds from the prohibition set out in this section. They are American crow, brown-headed cowbird, common grackle, house sparrow, red-winged blackbird and starling.

366. Procedure No. ENF 19.02.02.

367. MNR, "Authorization of Destruction/Possession of Nests and Eggs," WilPp.6.2.5 (31 March 1999).

No authorization is required to possess, take and/or destroy the nest or eggs of these birds.

The prohibition in the Act does not apply to migratory birds as defined and protected by the *Migratory Birds Convention Act* (MBCA). Individuals seeking authorization related to birds protected under the MBCA should be directed to the nearest office of the Canadian Wildlife Service.

The intent of Section 7 is to prevent the destruction of active nests and/or eggs. It is not however, intended to change our present approach regarding ongoing activities such as forest harvesting, road construction and other similar development activities. The following direction should be interpreted using this intent.

Forest harvesting operations

On Crown lands cutting guidelines are in place, to protect identified nesting areas for a number of bird species. These guidelines will continue to provide guidance regarding these operations. On private lands, landowners will be encouraged to protect important nest sites. Destroying an active nest (with eggs or young) is illegal under section 7, however the circumstances will have to be reviewed on an individual basis and in consideration for the intent of this section. Landowners will be encouraged to protect nests at times when not being used as well as for species which use the same nests for a number of years.

5.4.2 Forest management plans identified by Submitters

Within the context of forest management in Ontario, in order for a migratory bird nest to be protected during logging, the nest in question must be identified prior to or during logging, mapped as a “known value,”³⁶⁸ and then protected as an “area of concern” or “AOC” by not felling the tree in which the nest is found and leaving a buffer of trees around that tree. Under Ontario’s forest management system, “values” that are not “known values” are not mapped, are not recorded as areas of concern, and are afforded no special protection during logging.³⁶⁹

368. In Ontario’s Natural Resource and Values Information System (NRVIS), online: University of Waterloo <<http://www.lib.uwaterloo.ca/locations/umdl/digital/nrvs.html>> (date accessed: 29 November 2005).

369. See Ontario, *Forest Information Manual* (1 April 2001), 4.0 “Values Information” at 36-7: “Values are features, benefits, or conditions of the forest that are linked to a geographic area, that are of interest from various points of view, and that must be considered in forest management planning. Values information can be provided by any person or party at any time. [...] A listing of values classified into timber and non-timber groups is contained in Appendix II of this manual. [...] Non-timber values include such features as cultural heritage sites, native values, and critical wildlife and fisheries habitat areas, such as mineral licks, raptor nests, or spawning areas;” and *ibid.* at Appendix II “Listing of Values by Group, Class and Feature Type

Ontario's regulatory framework for forest management requires that

/ Wildlife / Nesting Site / Cooper's Hawk; Eastern Bluebird; Great Blue Heron Nesting Site/Colony; Peregrine Falcon; Pileated Woodpecker; Red-Shouldered Hawk; Snow Goose Nesting Site/Colony; Trumpeter Swan; Sandhill Crane; Red Tailed Hawk; Other Bird Species – Nesting Sites"). *Ibid.* at 40: "Part A, Section 1.4.4 of the FMPM states the requirement for the MNR to produce values maps for each forest management unit. Values maps provide a summary of the geographic location of *known* values about which further inventory information is available [emphasis in original]. A value is considered to be a *known* value when there is sufficient information to describe its geographic location and its basic features. Known values must be considered in forest management planning. The MNR shall determine if a value can be treated as a known value based on the available information and in consideration of the standards described in Section 4.2 and the roles and responsibilities described in Section 4.3. [...] The MNR must ensure that information about non-timber values is collected in accordance with the standards described in Section 4.2 and must ensure that priority is given to those values that are affected by proposed and optional areas of forest operations for the term of a forest management plan that is under preparation. The MNR must also ensure that the responsibilities to meet these requirements are not transferred to SFL holders (plan holders) or other forest resource license holders. [...] Values that are displayed on maps and are considered in forest management planning must be supported by further information gathered or created from inventories, surveys, tests, or studies (referred to as source data and information)." *Ibid.* at 17: "The Crown shall not claim ownership, copyright or intellectual property rights to source data, records and information that are created by forest resource license holders and are provided to the MNR. Source data, records, and information that are provided to the MNR are not subject to the copyright and ownership provisions of Section 1.2 of this manual and will normally be treated as confidential information. Source data, records and information may include, but are not limited to: aerial photographs; satellite imagery; maps; surveys; tests; studies; inspections; past and current records; pre- or post-operational field cruises; permanent or temporary sample plots; any data or information which has been collected and used to create, or support the creation of, information and information products prescribed by this manual." *Ibid.* at 40-41, 44: 4.2 "Standards for Values Information" "The standards described in this section identify the information required to treat a value as a *known* value. This information consists of two parts: a geographic location and a basic description for each feature. Information that meets these standards is considered to be conclusive information that is required to confirm and verify the presence and characteristics of a value. Only known values shall be depicted on values maps and considered in forest management planning. [...] Values described by point spatial features have no perimeter, no area and no measurable length when portrayed on operational scale mapsheets. Examples of these values are raptor nests, mineral licks, outpost camps, trapper cabins [...] Sustainable forest license holders (plan holders) and the MNR will provide each other with coverages that contain geographic information about values in accordance with the requirements described in Section 4.1 and in a specific digital form as described by the conditions in Section 4.5. These spatial standards apply to SFL holders (plan holders) and the MNR but do not apply to other forest resource licence holders. [...] The basic description of the features of a value must provide sufficient detail to allow planning teams to determine the appropriate AOC (area of concern) prescriptions and road locations to protect the existence, integrity, and health of a value."

known values be considered during forest management.³⁷⁰ There is no legal or policy guidance, of which the Secretariat is aware, spelling out what it means to “consider” a value.³⁷¹

There is area of concern planning for raptor and great blue heron nests,³⁷² and it is more common in the more southerly Great Lakes St. Lawrence forest than in the Boreal.³⁷³ This discrepancy results from the use of different harvesting methods.³⁷⁴ In the central mixedwood forests, shelterwood or selection harvesting is more often done, and these systems require tree markers to walk the forest in advance of logging, to identify the trees to be felled. Raptor and great blue heron nests are spotted during the tree marking process. As a result, their precise location is known, and they may be protected as known values during subsequent logging operations. In the north, where clearcut logging is the primary harvesting method, aerial surveys are the principal means of identifying raptor and great blue heron nests before logging, but these are only done by MNR when funding is available, and are not always considered reliable.³⁷⁵ Area of concern planning is not done for nests other than raptor and great blue heron nests.³⁷⁶

370. *Ibid.* at 36. In an independent forest audit report issued in 2003, the audit firm commented: “A thoughtful ecosystem management approach has figured largely in harvest layout and operations on the White River Forest. Inadequate funding for values collection is an issue on this Forest, as it is on most other Crown forests in Ontario;” ArborVitæ Environmental Services Ltd., “Independent Forest Audit of the White River Forest – 1999-2003 Final Report” at 97.

371. See MNR, *Forest Operations and Silviculture Manual*, 1st ed. (Ontario: Queen’s Printer, 1995) at 1: “Rather than give forest managers a set of strict rules that must be followed, Ontario relies on the professional judgement, within a set of broad guidelines and principles, of the people given the responsibility to manage the forest resource. These guidelines and principles are spelled out in a number of publications and directives, all of which are described in this Manual. This manual is a directory of the various guidelines and direction which a resource manager **must** consider during the preparation and implementation of forest management plans [emphasis in original].”

372. See MNR, “Habitat Management Guidelines for Cavity Nesting Birds in Ontario” (1984); online: MNR <<http://www.mnr.gov.on.ca/mnr/forests/forestdoc/guidelines/pdfs/cavity.pdf>> (date accessed: 28 November 2005).

373. Pers. comm. with David Euler (29 September 2005).

374. *Ibid.*

375. See “Forest Management Plan for the Brightsand Forest, Thunder Bay District, Northwestern Region, MNR, Bowater Pulp and Paper Canada Inc. for the twenty year period from April 1, 1999 to March 31, 2019” at 56: “Eagle, osprey and herons are included in the SFMM (Strategic Forest Management Model) assessment because objectives have been developed for these species. Generally, the SFMM model is too coarse to identify the specific habitat required for nesting by these birds. The suitable canopy trees required by these species may not be identified in the Forest Resources Inventory.”

376. Pers. comm. with David Euler (3 December 2005).

The Secretariat asked Dr. Fiona Schmiegelow whether full compliance with s. 6(a) of the MBR – avoiding all trees with migratory bird nests – is possible, in a logging context. Dr. Schmiegelow explained that it would be virtually impossible and impractical to locate every migratory bird nest protected under the MBR prior to logging, since many migratory bird nests are small and are hidden high in the upper forest canopy or are ground nests concealed in the forest floor.³⁷⁷ Furthermore, if a nest were located and moved to another location prior to logging, it might be abandoned³⁷⁸ (and under the Act, “disturbing” a nest is also an offence). In addition, if logging were scheduled to take place outside the nesting season, this would not rule out post-nesting season destruction through logging of those nests that may have been reused the following season³⁷⁹ (and in fact, the Act does not require proof that a nest is in use to establish a violation; the Secretariat is not aware of any federal enforcement policy direction in this regard).

The Secretariat asked Dr. Schmiegelow whether the percentage of the land base within the AOU that has been protected from logging (in parks and protected areas) is sufficient to sustain migratory birds on a population basis (i.e. whether these areas, on their own, are sufficient to ensure that “common birds remain common”³⁸⁰). She said no.³⁸¹ She added that even an increase in parks and protected areas to 25% of the AOU would be insufficient on its own to achieve such an objective, meaning that within the AOU, under current land use designations, one must rely on the logging industry to ensure that sufficient suitable habitat is also left on the intervening landscape for the maintenance of migratory bird populations.³⁸² MNR has instructed forest management planners to include provincial parks and protected areas located within their FMUs in calculating available habitat for old growth dependent species, though it requires preparation of an up-to-date forest inventory for the relevant park or protected area.³⁸³ MNR recognizes, however, that “Ontario Parks and Field Services are under no obligation to maintain areas of marten habitat within parks and protected areas that may be used in forest management planning,” though it adds that “Ontario Parks, through their involvement in the preparation of individual forest management plans, will be made aware of the use of parks in determining and meeting core habitat targets.”³⁸⁴

377. Pers. comm. with Fiona Schmiegelow (14 December 2004).

378. *Ibid.*

379. *Ibid.*

380. See Partners In Flight Canada, online: CWS <http://www.cws-scf.ec.gc.ca/birds/lb_ot_e.cfm> (date accessed: 25 October 2005).

381. Pers. comm. with Fiona Schmiegelow (14 December 2004).

382. *Ibid.*

383. See MNR, “Marten Habitat Guide Interpretation Note” (30 September 2004) at 8.

384. *Ibid.*

Ontario has recognized the importance of ensuring that activities on intervening landscapes do not compromise the ecological integrity of parks and protected areas, and has expressed confidence that logging does not pose a threat in this regard:

About 70 percent of the planning area has been placed in a general use designation. This designation includes all Crown lands not placed into a specific designation or EMA (Enhanced Management Area). A full range of resource and recreational uses can occur in General Use Areas. Management of General Use Areas will occur in the context of maintaining ecological sustainability. There is an extensive set of legislation, policy and guidelines that will support and direct management actions in General Use Areas. In the short term, further planning in General Use Areas will primarily occur through the forest management planning process. This planning is required to consider a broad range of objectives. For example, there are many forest management guidelines that provide specific direction for the management or protection of significant natural values. Planning in General Use Areas will also need to consider implications of management actions on adjacent land use designations or EMAs. For example, the new protected areas have been delineated on the basis that extensive buffering is not required, because of the ecologically sustainable management that will occur on adjacent lands. Appendix A, which outlines area-specific policies, does not include policies for areas that have been identified for general use. In many situations, existing DLUGs (district land use guidelines) provide relevant resource management direction for General Use Areas. More specific identification of policies for these areas will occur during future planning.³⁸⁵

However, independent auditors have noted that relying on the forest management system to address a range of concerns not directly related to logging can lead to conflict with other forest users:

The Need for Land Use Planning

The Audit Team believes that the most serious issue regarding the management of the White River Forest is related to the inter-relation between forest management planning and land-use planning. The forest management planning process has become so encumbered with land use planning issues that the potential exists for the Forest's socioeconomy to suffer. Because Ontario does not have a current land-use planning process within which issues regarding land-use zoning and planning on Crown lands can be effectively addressed, Forest Management Plans have become the *de facto* arena for tackling these problems. At present, 11 environmental assessment "bump-up" requests³⁸⁶ have been received for the 2003 Plan.

385. See MNR, "Ontario's Living Legacy Land Use Strategy" (Ontario: Queen's Printer, 1999) at 25.

386. The Timber Class EA allows the public to request Ontario's Ministry of the Environment to conduct an environmental assessment of an individual forest management

The Audit Team believes this is more than has been received for any other Forest Management Plan undertaken in the province. Complex issues face the Forest regarding access, remote and road-based tourism, and because of its proximity to Pukaskwa National Park. This audit's most important recommendation calls for a land use plan to be developed for the sub-region in which the White River Forest exists.³⁸⁷

The Secretariat asked Dr. Schmiegelow to review and comment on the findings of Dr. Euler's analysis of Table FMP-5 under 38 Ontario forest management plans.³⁸⁸ Dr. Schmiegelow pointed out that projected habitat loss under those plans was consistent with estimated habitat loss³⁸⁹ for the same species resulting from past logging activities in Ontario, adding:

The take home from this is that managed forests in Ontario have already experienced significant declines in available habitat for a number of forest bird species, and continuing declines are anticipated. In order to translate this into province-wide population trends, one would need to conduct an assessment across the entire range of each species in the province, but it is clear that populations in forests allocated for timber production are at risk due to habitat loss associated with forest harvesting.³⁹⁰

plan (Timber Class EA Reasons for Decision and Decision at 106, "The Bump-up Provision" and Appendix 15, "Bump-Up Procedure"). The Ministry has generally not granted such requests, but requests have resulted in the Ministry imposing certain conditions on forestry or requiring MNR to move forward on policy development. See e.g. MNR, *Annual Report on Forest Management 2001/2002* (Ontario: Queen's Printer, 2004) at 91: "Also, as the result of a condition on the denial of a request for an individual Environmental Assessment on the 1999 Temagami Forest Management Plan (November 1999), the MNR was required by the Ministry of the Environment to produce a first draft of the 'Forest Management Guidelines for the Emulation of Fire Disturbance Pattern' by September 30, 2000 and complete the final document by May 31, 2001. The deadline for the final document was later extended to November 30, 2001."

387. ArborVitae Environmental Services Ltd., "Independent Forest Audit of the White River Forest – 1999-2003 Final Report" at 97. See also Provincial Forest Policy Committee – Summary of Discussions (11 September 2003) at 5: "The Lands for Life regional planning was recognized but in the absence of this upper level planning and with local issues on roads, RSA's (Resource Stewardship Agreements between forestry companies and remote tourism operators) can become the lightning rod for these contentious issues."

388. See s. 5.3.3.2.3, above.

389. See J.R. Malcolm *et al.*, "Potential indicators of the impacts of forest management on wildlife habitat in northeastern Ontario: a multivariate application of wildlife sustainability matrices," (2004) 28 *The Forestry Chronicle* 91.

390. Fiona K.A. Schmiegelow, "Forest Management Planning and Migratory Birds in Ontario" (May 2005) [unpublished] at 2 (see References in Appendix 7). In its comments on the accuracy of the draft factual record, Canada states: "Canada **does** in fact use threats (both on breeding and non-breeding grounds) in assessments of

Dr. Schmiegelow then reviewed available information on the conservation status of birds covered by Dr. Euler's analysis, considered whether projected habitat loss is accounted for in Canadian conservation planning for migratory birds, and emphasized the need to be aware of issues regarding data quality and sufficiency as well as any limitations on modeling capacity:³⁹¹

At this point, 3 key questions merit further consideration:

- (i) What consideration had the species identified in Euler's assessment of FMPs been given in earlier conservation priority-setting exercises?
- (ii) How do the magnitude of declines compare to those used in species status assessment procedures (e.g., criteria for listing)?
- (iii) Would better habitat models result in more optimistic scenarios?

Dunn (1997) and Dunn *et al.* (1999) provide published accounts of priority-setting exercises for landbirds in Canada. The scoring systems are similar; however, the 1997 report provides region-specific information (i.e. provincial scores). The criteria used in the assessments included concern (a composite of abundance and breadth of range, and population trend for the national assessment; trend only for provincial assessment) and responsibility (based on the proportion of the species range represented within the jurisdiction considered). The end result of the national assessment was the assignment of priority ranks to species for conservation action. **Table 2 summarizes the national and provincial scores assigned to the 10 forest bird species included in Euler's 2005 FMP summary [emphasis added].**

Table 2. Assessment scores for select forest bird species based on concern and responsibility (after Dunn 1997 and Dunn *et al.* 1999). Possible scores on each criterion range from 1 to 5, with higher scores indicating greater priority for conservation action.

Bird Species	National Score ³⁹²		Ontario Score	
	Concern	Responsibility	Trend	Responsibility
American Redstart	3	4	3	4

the level of conservation concern for the species [emphasis in original]." Canada explains that it does so through participation in "Partners in Flight" activities. See *infra*, s. 5.5.2.3.

391. See References, Appendix 7.

392. National scores ≥ 4 for either concern or responsibility result in species being high priorities for conservation action (Dunn *et al.* 1999).

Table 2. (continued)

Bird Species	National Score ³⁹²		Ontario Score	
	Concern	Responsibility	Trend	Responsibility
Bay-breasted Warbler	3	5	3	5
Blackburnian Warbler	Medium	3	3	4
Black-backed Woodpecker	2	4	3	4
Boreal Chickadee	4	5	3	4
Golden-crowned Kinglet	3	4	2	4
Least Flycatcher	3	4	4	5
Pileated Woodpecker ³⁹³	Low	2	1	4
Ruby-crowned Kinglet	3	4	3	4
Swainson's Thrush	3	4	3	4

All species considered rank as medium to high priorities for conservation action at both the national and provincial levels, with the exception of the Pileated Woodpecker. While national ranking of this species is low, the responsibility score for Ontario remains relatively high. Many of the forest bird species among the broader set considered by Malcolm *et al.* 2004 in an evaluation of the impacts of forest harvesting on wildlife habitat in north-eastern Ontario rank similarly high. In theory, such designations translate into enhanced monitoring, research, direct conservation action, or some combination thereof (see Dunn *et al.* 1999). At the least, one might expect that outcomes for such species would be routinely tracked in established processes, such as forest management planning and approval, which affect populations through changes to habitat. However, this link appears not to exist.

392. National scores ≥ 4 for either concern or responsibility result in species being high priorities for conservation action (Dunn *et al.* 1999).

393. Dunn *et al.* 1999 reported on species with scores ≥ 4 for either concern or responsibility. In the case of missing data, Canadian scores were taken from Dunn 1997 (see References, Appendix 7).

A very unusual characteristic of the Canadian ranking system for landbirds is that the scoring system for concern does not include "threats". Such information is routinely incorporated into other North American avian conservation priority ranking systems (see Mehlman *et al.* 2004 for a review). The rationale provided is that threats vary regionally, such that they might not affect national population status. However, Dunn *et al.* 1999 do suggest that threats could be considered at the provincial level. Were this implemented, we would expect to see substantial increases in concern scores for many forest bird species in Ontario, based on habitat projections included in approved FMPs. Established quantitative guidelines exist for assessing the status of a species based on past and *projected* changes in populations, including a decline in area of occupancy, extent of occurrence and/or quality of habitat (IUCN 2001; see Appendix 1³⁹⁴). These guidelines have been adopted by COSEWIC (Committee on the Status of Endangered Wildlife in Canada), as well as a number of provincial jurisdictions.

Trend information forms an important component of most evaluation systems. Within the Canadian landbird priority-setting system, trend data were derived from the longest run of good monitoring data available (Dunn 1997). While reliable data may be available for relatively accessible areas in Ontario with large volunteer populations, the same cannot be said for the northern regions of the province (or the country, for that matter). Where data do exist, they tend to represent a biased sample, having been collected in conjunction with the standardized roadside counts conducted for the North American Breeding Bird Survey (BBS). There is good evidence that some forest bird species avoid roads, and where roads are present, so too is development of some sort; both of which can lead to poor population estimates for sensitive species. Very few long-term sample plots for birds exist in northern forested regions; those that do are very limited in their geographic scope, hampering extrapolation to larger regions. Thus, caution is warranted in the interpretation of trend information. Nevertheless, if we accept the assigned ranks based on what data do exist, it is still important to evaluate the magnitude of change associated with the scores, relative to various assessment criteria and habitat projections.

Dr. Schmiegelow considered the place of projected habitat loss within Canada's framework for setting bird conservation priorities:

Scores of 4 and 5 correspond to statistically significant declines of 1-3%/yr and $\geq 3\%/yr$, respectively. Extrapolated over a 10 year period, these translate into approximately 10-30% and $>30\%$ effective declines. The IUCN (International Union for the Conservation of Nature) criteria (Appendix 1)³⁹⁵ stipulate that a decline of $\geq 30\%$ in any 10 year or three generation

394. Not reproduced herein.

395. Not reproduced herein.

period that includes both past and future (cause not ceased, understood or reversible) results in a status of *Vulnerable*, or *Threatened* under COSEWIC. Thus, projected changes of this magnitude could trigger legal listing of species. While few forest species meet this criterion based on historical trend data, the results of Malcolm *et al.* 2004 and Euler 2005 suggest that forest management activities could produce such an outcome, which is clearly undesirable. Moreover, changes of a lesser magnitude can qualify for a listing of *Near Threatened* if estimates of populations or habitat are near the *Vulnerable* threshold, especially when there is a high degree of uncertainty (IUCN 2003). There is precedent for this in Canada, where at a provincial level, several forest bird species have been listed as *Species of Special Concern* under the *Alberta Wildlife Act*, due to projected declines in available habitat resulting from development activities (see <http://www3.gov.ab.ca/srd/fw/esc/>).

Dr. Schmiegelow commented as follows on modeling tools used to plan for wildlife habitat conservation in the forest management plans identified by the Submitters:

The assessments described herein rely largely on a set of habitat matrix models which have little empirical substantiation for the region in question. The models were derived from literature on the species from other regions, and expert opinion. These sorts of habitat suitability indices were very popular in the 1980's and early 90's, but have been extensively criticized and discredited in the ecological literature, and have been challenged as planning tools. Efforts are underway to update the Ontario models with local data (Holloway *et al.* 2004), but these still rely on coarse assignment of categories of suitability within a habitat matrix. Moreover, they contain no information about the spatial context or configuration of habitat, which can be an important predictor of bird species abundance. Much more sophisticated modeling approaches are being developed and applied; some of them by Ontario government personnel (e.g., Rempel and Kushneriuk 2003). Furthermore, the use of models must go beyond initial development and application: they must be carefully evaluated prior to use (e.g., Boyce *et al.* 2002), and a monitoring program must be established to determine (1) whether the habitat conditions predicted by the models are realized (i.e. monitoring compliance with planned activities), and (2) whether the predicted response by species to the habitat conditions created by management are realized (i.e. effectiveness monitoring). All of these steps should be considered fundamental to an adaptive approach to forest management that recognizes the uncertainty inherent in management decisions, and establishes management strategies that enhance learning without precluding future opportunities for change, as new information becomes available. This must include the designation of large reference areas as controls for management and reserves of populations of sensitive species.

5.5 *Canada's actions to enforce and promote compliance with s. 6(a) of the MBR in connection with logging identified by the Submitters*

One of the obligations of Canada under the NAAEC is to effectively enforce its environmental laws and regulations through appropriate governmental action.³⁹⁶ The NAAEC lists examples of appropriate governmental action, including inspections and compliance monitoring; investigating suspected violations (including use of searches, seizures and detention); efforts to assure voluntary compliance and reach compliance agreements; publishing non-compliance information; promoting environmental audits; requiring record keeping and reporting; using mediation and arbitration; issuing permits and other authorizations; and initiating proceedings or issuing orders to seek remedies or sanctions.³⁹⁷ In preparing the factual record, the Secretariat sought to gather all information relevant to the subject of enforcing and promoting compliance with s. 6(a) of the MBR during logging identified by the Submitters.

5.5.1 *Enforcement*

S. 6(a) of the MBR makes it an offence to disturb, destroy or take a nest of a migratory bird without a permit.

396. Art. 5(1) of the NAAEC: With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as:

- (a) appointing and training inspectors;
- (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
- (c) seeking assurances of voluntary compliance and compliance agreements;
- (d) publicly releasing non-compliance information;
- (e) issuing bulletins or other periodic statements on enforcement procedures;
- (f) promoting environmental audits;
- (g) requiring record keeping and reporting;
- (h) providing or encouraging mediation and arbitration services;
- (i) using licenses, permits or authorizations;
- (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations;
- (k) providing for search, seizure or detention; or
- (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.

397. *Ibid.*

Canada's Compliance and Enforcement Policy for Wildlife Legislation³⁹⁸ tells enforcement officers under what circumstances they must enforce the law and how to select among potential responses to violations. Pursuant to federal policy, enforcement of s. 6(a) of the MBR must be preceded by an assessment of the evidence available and the application of a set of criteria for responding to violations:

Officers will review suspected or alleged violations. If it can be determined that there has been no violation or that there is insufficient evidence to warrant further investigation, the officers will take no additional enforcement action. If they can substantiate that a violation took place, they have a legal obligation to enforce the law and use their discretionary power to choose the most appropriate response from those reviewed here.

Criteria for Responses to Violations

Before deciding on how to respond to violations, enforcement officers will consider factors such as:

The nature of the violation

This includes how endangered the species is and the degree of harm or potential harm to Canadian ecosystems. Officers will also consider the intent of the alleged violator and whether the violator attempts to conceal information or otherwise thwart the objectives and requirements of the legislation.

How best to achieve the desired results

The officers' objective is to achieve compliance with the legislation within the shortest possible time and with no recurrence of violation. Factors to be considered include the alleged violator's history of convictions, the violator's willingness to cooperate with enforcement officers, proof that the violator has taken corrective action, and evidence of enforcement actions relating to the same illegal activity but brought under other statutes by other federal or provincial authorities.

Consistency in enforcement

Enforcement officers want to be consistent when deciding what action to take. Accordingly, they will consider precedent cases.

The Compliance and Enforcement Policy lists a range of potential responses to violations, including warnings, directives by officers, tick-

398. Canada: Minister of Public Works and Government Services, 1998 [hereinafter the "Compliance and Enforcement Policy"] at 16: "Criteria for Responses to Violations."

eting, seizures, and prosecutions, but it also lists as a response “No action”:

Occasionally, officers will obtain evidence of an infraction but will be unable to locate the offender or to determine who committed the offence. In these cases, no action will be taken other than documenting the case and providing for the care and custody of evidence of a violation and its disposition in conformity with the existing acts and regulations.³⁹⁹

5.5.1.1 Evidence required to trigger action

In accordance with the direction contained in the Compliance and Enforcement Policy, an enforcement officer has a legal obligation to enforce the law only if he or she can substantiate that a violation took place. The Secretariat received no information from Canada, pursuant to the Secretariat’s Request for Information for the development of the factual record, indicating that an enforcement officer working for or on behalf of Environment Canada inspected logging activities identified by the Submitters to verify compliance with s. 6(a) of the MBR.

In connection with enforcement of s. 6(a) of the MBR, Canada has stated in its responses to the submission that Environment Canada acts on public complaints.⁴⁰⁰ Canada has observed that only one complaint was received regarding logging during the nesting season in the AOU in 2001, and that the complaint was received from someone other than the Submitters.⁴⁰¹ The Secretariat received no information from Canada indicating that an enforcement officer working for or on behalf of Environment Canada inspected logging activities identified by the complainant in order to verify whether the occurrence of a violation of s. 6(a) of the MBR could be substantiated. In its comments on the accuracy of the draft factual record, Canada stated:

The Government of Canada’s Response provided to the Secretariat on October 16, 2003 includes the following information which is a more accurate picture of what transpired with regards to that complaint:

The letter of complaint referred to the fact that the Contingency Forest Management Plan, which encompassed the brief period of July 12 to September 1, 2001, included a number of clear-cuts and claimed that these clear-cuts would destroy the nest of migratory birds during nesting season.

399. *Ibid.*

400. Response at 9 and Response to Supplemental Information at 6-7.

401. *Ibid.*

The wildlife officers dealing with the complaint determined that it did not warrant further investigation⁴⁰² or inspection after consulting with the Ontario Ministry of Natural Resources (OMNR). Since the reported logging operations had ceased some time before, it would be very difficult to collect potential evidence of nest destruction. The OMNR further indicated that no other logging activities were planned. In the absence of any indication of further activities, the officer assessed, in light of the fact that the breeding season was over for many species, that there was no immediate threat to migratory birds in that area that would warrant further enforcement activities at this point.

A review of the Canadian Wildlife Service website, both national and Ontario region, revealed no instructions to the public on how to report suspected violations of s. 6(a) of the MBR occurring during logging, or any information on a procedure for linking tips from the public to enforcement of s. 6(a) of the MBR by government authorities.⁴⁰³ In its comments on the accuracy of the draft factual record, Canada stated:

Canada notes that this is an overstatement as complaints can easily be made over the Internet. Environment Canada's GreenLane (www.ec.gc.ca) has a 'Contact Us' button for anyone wanting to contact the Department of Environment on any matter, and the Wildlife Enforcement Program also has a 'Contact Us' button for those wanting contact the Wildlife Enforcement Program directly. The contact information and phone numbers for the regional offices and the National Capital Region can also be found on the website. There is also an Emergency line available 24 hours a day that can be used to establish contact with officers on an emergency basis.

Both Canada and MNR indicated that they could not take enforcement action in connection with violations of the law that are anticipated

402. E-mail from Officer in Charge of Investigations, Wildlife Enforcement Division, CWS-Ontario Region (Partner) to Chief, Wildlife Enforcement Division, CWS-Ontario Region (Case Officer) (9 September 2001): "[Name deleted], as I stated before I have no plans to INVESTIGATE this file or assign anyone to investigate it [emphasis in original]. When time permits I will send a letter that states much of what HQ provided for responding to these types of matters and fact that we are satisfied the OMNR has covered off all bases. These e-mails only make the complainant believe we are investigating when we are not. He is going to be upset when I find the time to respond to his concerns because you have him thinking we are doing an investigation best I can tell. I have no time to deal with everything that comes across our desk given all the other duties that we must do, especially if I believe there is no investigation to be done."

403. For e.g., on the "Hinterland Who's Who" website managed by CWS and intended for a public audience, reporting violations of the law is not listed under "Things You Can Do," online: Hinterland Who's Who <<http://www.hww.ca/hww.asp?id=43&pid=3>> (date accessed: 7 December 2005).

to occur, where the prediction is based on the application of a model that correlates available bird density data with projected harvesting under approved forest management plans.⁴⁰⁴ MNR explained that while modeling using available data is appropriate as a basis for assessing and authorizing logging activities involving migratory bird nest destruction, modeling using available data is not appropriate as a basis for enforcement action.⁴⁰⁵ Under Ontario's *Environmental Bill of Rights*, Ontario's Ministry of the Environment (MOE) has investigated public allegations founded on the content of approved forest management plans.⁴⁰⁶ For example, MOE has conducted an investigation in response to an allegation from the public that MNR was not requiring forest management planners to respect a Timber Class EA condition regarding upper size limits for clearcuts.⁴⁰⁷ The *Environmental Bill of Rights* gives residents of Ontario the right to request an investigation into alleged failures to comply with environmental permits, laws and regulations in force in Ontario.⁴⁰⁸ Included in the list of laws and regulations for which an investigation can be requested by the public is the federal *Fisheries Act*.⁴⁰⁹ The MBCA is not included in the list.

It has been pointed out that in a forest management context, the persons most likely to be aware of a failure to comply with an environmental law or regulation would be persons working for forestry companies, and in particular those employed as inspectors under the province

404. See Response to Supplemental Information at 3 and pers. comm. with Manager, Forest Policy Section, Forest Management Branch, Forests Division, MNR (28 June 2005).

405. Pers. comm. with Manager, Forest Policy Section, Forest Management Branch, Forests Division, MNR (28 June 2005).

406. See Environmental Commissioner of Ontario, *1999 Annual Report Supplement* at S7-26: 199015: "Alleged Contraventions by MNR of s. 38 of the EAA and Terms and Conditions 27, 94(b), 82 and Appendix 20 of the Timber Class EA relating to clear cutting and annual reporting (MOE)," online: Environmental Commissioner of Ontario <<http://www.eco.on.ca/english/publicat/ar1999su.pdf>> (date accessed: 29 November 2005). See also MNR, Provincial Forest Technical Committee – Summary of Discussions (6 November 2002) at 4: "4. EBR Investigation of Planned Clearcuts – Manager, Forest Policy Section / [Manager, Forest Policy Section] noted that this is an ongoing MOE investigation. MNR has provided information in response to an MOE request but is uncertain when a decision would be made. The management units involved are all in the NER (Northeast Region) (i.e. Gordon Cosens Forest, Wawa Forest and Temagami)."

407. *Ibid.*

408. See *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, s. 74 *et seq.* See also Ontario, Environmental Registry, online: <http://www.ene.gov.on.ca/envision/env_reg/ebr/english/ebr_info/Requesting_a_investigation.htm> (date accessed: 29 November 2005).

409. See s. 9(1)9 of O.Reg. 60/05.

of Ontario's forestry self-inspection system.⁴¹⁰ Ontario's forest management framework does not provide whistle-blower protection to in-house inspectors who wish to draw attention to non-compliance with environmental laws such as s. 6(a) of the MBR.⁴¹¹

5.5.1.2 Nature of the violation

Under the Compliance and Enforcement Policy, enforcement officers are required to consider the nature of the violation before deciding how to respond to a violation. This includes considering how endangered the species is and the degree of harm or potential harm to Canadian ecosystems. This is consistent with Environment Canada's policy objective of ensuring "long-term survival of healthy bird populations in working landscapes across their natural ranges."⁴¹² The Submitters correlated harvest data for 2001 with available bird density data and arrived at an estimate of approximately 45,000 potential violations of s. 6(a) of the MBR. In Canada's response to the submission, Canada questioned the figure arrived at by the Submitters, as the Submitters' calculations assumed that logging occurred at an even rate throughout the year and used unstratified bird density data.⁴¹³ In Canada's response to the Secretariat's Request for Information, Canada provided information on birds nesting in the FMUs identified by the Submitters.⁴¹⁴ Based on the information provided by Canada, the Secretariat's expert, Dr. Fiona Schmiegelow, indicated that the estimated number of violations would likely be higher than the figure advanced by the Submitters.⁴¹⁵ The

410. See Mark S. Winfield & Hugh J. Benevides, *Industry Self-Inspection and Compliance in the Ontario Forest Sector* (Alberta: Pembina Institute for Appropriate Development, 2003) at 30.

411. *Ibid.* at 26-27.

412. See CWS, "Migratory Birds Program Plan – A component of the Canadian Wildlife Service Strategic Plan" (Draft – Version June 2004) at 6.

413. Response to Supplemental Information at 3.

414. Response to Request for Information at 1.

415. Fiona K.A. Schmiegelow, "Comments on MNR and Environment Canada Responses to Request for Information Relevant to Factual Record (SEM-02-001)" (January 2005): "One of the criticisms by EC of the estimate in the original, and supplementary, submission, was the lack of stratification when calculating nests potentially destroyed by logging (i.e. a single estimate of nest density was used for each FMU). While I do not think quibbling over the accuracy of numbers is the appropriate response – does it really matter when the magnitude is clearly in the 10's of thousands, any of which could be considered violations – the stratified density estimates provided by EC would likely result in a higher overall estimate of nests destroyed than that alleged. I calculated the mean density used in the supplementary submission as 4.74/ha, or 474/km². The information provided by EC and MNR does not allow ready calculation of a stratified estimate of nests potentially destroyed (areas logged are not assigned to habitat type, and the density estimates are for all

Secretariat did not receive or locate any information indicating that the Canadian Wildlife Service has assessed the role of forestry, if any, as a threat to migratory bird species, or as a source of harm or potential harm to Canadian ecosystems, for the purpose of considering enforcement action in connection with violations of s. 6(a) of the MBR.⁴¹⁶ However, Canada has stated:

The availability of information demonstrating a connection between logging and a downward trend in migratory bird populations is not determinative of whether or not an enforcement action will be taken. If there is evidence that a violation of s. 6(a) has occurred, the Compliance and Enforcement Policy outlines the criteria for responses to violations and the possible responses to a violation. Information on downward trends demonstrating a connection between logging and the downward trend would be one of the factors considered in the determination on how to respond to a violation.⁴¹⁷

In its comments on the accuracy of the draft factual record, Canada stated:

Due to the Secretariat's reliance on selected third party opinions, the general tone of the document is not well balanced; it appears that the Secretariat is attempting to substantiate the submitter's allegations, as opposed to presenting a fulsome accounting of the facts. For instance, given the specificity and the implied gravity of the submitter's assertions regarding the

landbirds), but given that both density estimates for BCR 8 (605 pairs/km², coniferous and 721/km², deciduous) are considerably higher than that utilized, as is the deciduous estimate for BCR 12 (583/km²), I conclude that the density estimate used in the submission is conservative relative to the numbers provided by EC. Applying the discounting factor (0.82) used in the original calculation to account for species not covered by the MBR does not account for the differential."

416. In its Response to the Request for Additional Information at 2-3, Canada stated: "There is currently no CWS program work providing annual comprehensive assessments of land birds in the boreal forest because of reduced overall budgets and some emphasis on priorities in southern Ontario. [...] There are no efforts devoted to assessing impacts of logging specifically on migratory bird populations, population trends or habitat in this part of Ontario." However, Canada did draw the Secretariat's attention to a magazine article outlining preliminary results from a multistakeholder study comparing bird populations in naturally disturbed and logged areas in Ontario: R. Zimmerling, "Disturbance in the forest: evaluating the impact of forestry on boreal birds," (2004) 27 *Birdwatch Canada* 8 at 11: "More research and analyses are clearly needed before management recommendations can be made. However, assuming that there is no acceleration in the rate at which timber is harvested, and that large tracts of mature forest stands are preserved throughout the landscape (i.e., within each 10 km by 10 km square), boreal bird populations and timber harvesting should be able to coexist."

417. Response to Request for Additional Information at 6.

number of nests that were allegedly destroyed in the year 2001 on 49 FMUs, we note that the following contextual information, which was provided to the Secretariat, does not appear in the factual record:

- In 2001 logging in Ontario occurred on less than 0.5% of the land base, therefore, by inference, 99.5% of migratory bird nests remained on the landscape, subject to natural predation and disturbances;
- More than twice the area logged is burned or affected by insect damage in a year: each of these natural disturbances results in the destruction of nests; and
- Natural disturbances alone would deplete more area than is harvested annually if fire suppression were not undertaken in conjunction with harvesting.

Under federal policy, another factor to be considered by enforcement officers in determining how to respond to a violation of s. 6(a) of the MBR is the intent of the alleged violator. While the law does not require proof of any particular state of mind in order to establish a violation of s. 6(a) of the MBR, intent is taken into account by enforcement officers in deciding how to respond to a violation. The Secretariat did not receive or locate any information regarding how intent is considered in connection with the taking of enforcement action to address violations of s. 6(a) of the MBR during logging, such as how different types of intent (specific intent; general intent; recklessness; wilful blindness⁴¹⁸) would be weighed in considering enforcement options.

As regards the role of intent when it comes to logging impacts on migratory birds, regulations listing activities which could qualify as "projects" subject to the federal environmental assessment process were amended in 1999 to include the following:

Physical activities carried on in Canada outside a national park, national park reserve, national historic site or historic canal and that are intended to threaten the continued existence of a biological population in an ecodistrict, either directly or through alteration of its habitat, except for activities carried on at or in the immediate vicinity of an airport to ensure the safe operation of aircraft.⁴¹⁹

418. For comparison purposes, see e.g. discussion on consideration of intent in Larry Martin Corcoran, "Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths," (1999) 77 *Denv. U.L. Rev.* 315 at 315-327.

419. S. 48.1 of the *Inclusion List Regulations*, SOR/99-436.

In February 2000, the Canadian Environmental Assessment Agency issued guidance on the interpretation and application of this new provision, explaining:

The intent to effectively eliminate the biological population from the entire ecodistrict must be clearly evident [emphasis in original]. An incidental effect of threatening the continued existence of the population, as a result of an activity having some other purpose, would not make the activity a project as described in section 48.1.⁴²⁰

Thus, a project consisting of logging trees for the purpose of effectively eliminating a biological population of migratory birds from an ecodistrict could both qualify as a project potentially subject to an environmental assessment under CEAA and be subject to enforcement action under the CWS Compliance and Enforcement Policy for any violations of s. 6(a) of the MBR that occurred during the logging.

A paper delivered by an employee of the Forest Products Association of Canada at a workshop organized by CWS in October 2001 to promote compliance with s. 6(a) of the MBR contained the following conclusions on the topic of “Migratory Birds Conservation and SFM (Sustainable Forest Management): How to Deal With Existing Regulations”:

In a near future the federal government and our industry could face more pressures to enforce and comply to the migratory birds regulations.⁴²¹ The outcome of these tensions is often unpredictable. Here are some options.

420. Canadian Environmental Assessment Agency, *Canadian Environmental Assessment Act – Guidance on the Interpretation and Application of Section 48.1 of the Schedule to the Inclusion List Regulations – Draft* (February 2000) at 4.

421. See Robert Décarie, Biodiversity Advisor, Forest Products Association of Canada, “Migratory Birds Conservation and SFM: How to Deal With Existing Regulations” (October 2001) at Appendix 2: “Examples of Pressures on Governments:

- Submission by US and Canadian ENGOs to the Secretariat of the Commission for Environmental Cooperation (CEC) alleging that the United States Government is “failing to effectively enforce” section 703 of its Migratory Bird Treaty Act (MBTA) which prohibits the killing or “taking” of migratory birds except under limited circumstances. Decision on that submission is still pending.
- Court cases against the US government for not respecting migratory birds regulations regarding forest operations.
- Successful use of the Migratory Convention Act by ENGOs to ask for the prohibition of the issuance of further *Fisheries Act* authorizations (Cheviot case).
- Sierra Legal Defense Fund’s petition to the Auditor General requesting a review of federal government’s improper issuance of permits authorizing harm to migratory bird nesting grounds.
- The likelihood that environmental organizations are preparing a submission for CEC on Canada’s lack of enforcement of its migratory birds protection regulations.

- 1) The CWS could decide to strictly enforce its regulation for protecting nests. This is highly unlikely because of the impacts on many sectors and because of the lack of enforcement resources.
- 2) The CWS could selectively enforce its regulation (+/- the *status quo*). This is certainly acceptable to our industry since our impacts (due to nest disturbance) on bird populations are marginal. This solution does not fix our vulnerable situation of potentially being accused of not complying to the regulation. This could become a PR hot potato.
- 3) The CWS could amend its regulation in order to emit permits for incidental destruction of nest under specific circumstances. This could result in a situation where we are observing regulations to the letter but would create another layer of red tape and, in fact, would open forest management to CEAA (*Canadian Environmental Assessment Act*).
- 4) The CWS could maintain its current regulations but develop and publicize an enforcement policy. This policy could exclude forest management from enforcement under certain conditions to be defined such as:
 - Operations done according to a SFM plan containing measures that address migratory birds conservation and duly approved by provincial legal authorities.
 - Existence of a bilateral agreement between the CWS and provincial departments of natural resources framing migratory birds conservation requirements.
 - Existence of a third party certified SFM plan with measures for birds.
- 5) The CWS could amend its regulation along the line of the previous option.

Options 4 and 5 could meet our needs. Our efforts should lead to such an outcome. To get there our challenge is to:

- Get the recognition that our operations and their impact on nest have a marginal effect on forest birds populations;
 - Demonstrate that through SFM, habitat supply analysis, and the coarse filter approach, we do successfully maintain habitat for forest birds;
 - Provide examples that we can address, if necessary, specific wildlife needs through our fine filter approach and adaptive management; and
-
- The Endangered Species Coalition has been very active since the mid-nineties in trying to convince the federal government that it has jurisdiction over migratory birds habitat.”

Make sure that the solution avoids the use of federal permits.

In its comments on the accuracy of the draft factual record, Canada stated:

It is factually inaccurate to state that 'the Secretariat received no information from Canada indicating that any such [enforcement] action had been taken.' Canada notes that inspections and monitoring are only two of the enforcement options that are available to the Federal Government, and that it is misleading to focus solely on these two actions. Article 5 of the NAAEC lists a range of actions that aim to achieve effective enforcement of environmental law. This list includes, among others, actions 'seeking assurances of voluntary compliance and compliance agreements.' Compliance promotion activities are also considered an enforcement activity by Environment Canada.

On October 16th, 2003, the following information regarding Canada's compliance promotion activities was forwarded to the Secretariat. This information was part of the Government of Canada's response to the supplemental information provided by the submitters with respect to SEM-02-001:

Prior to the filing of the submission, in 2001, CWS and the Forest Products Association of Canada had started working jointly to organize a workshop on migratory bird conservation and forestry which included a discussion of compliance issues. The workshop was held in October 2001. This workshop included CWS biological staff, Environment Canada enforcement staff, planners working in the forest industry, members of the sustainable forestry network, and Canadian Nature Federation (CNF, one of the NGO submitters to SEM-02-001). The workshop covered the current situation pertaining to the MBR, the enforcement approach of Environment Canada, and issues related to the conservation of forest birds. CWS stated its intention to continue to hold additional meetings with other groups that CNF had previously contacted. Outcomes of this workshop were an affirmation of the significance of the forest environment for the conservation of a large number of migratory bird species and of the difficult compliance issues faced by industry.

Following this workshop, CWS continued its attempt to widen the dialogue by involving a larger spectrum of non-governmental environmental organizations. As described in the initial response to SEM-02-001, a meeting was held on February 5th, 2002, at the Sierra Legal Defence Fund office in Toronto. In particular, representatives of the following groups attended: Sierra Legal Defence, CNF, Federation of Ontario Naturalists and Wildlands League. Environment Canada was represented by migratory birds program staff, and

enforcement staff. At the meeting, Environment Canada officials understood that the meeting, which they had wanted for some time, had been delayed until after submission SEM-02-001 was filed with the Secretariat. The intended purpose of the meeting was to allow CWS to explain the legal basis of the MBR, the overall approach for the conservation of migratory birds, including enforcement, and the foundations of the current policy on MBR enforcement. By organizing this meeting, CWS sought input from the submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. CWS explained that their approach on regulations and enforcement had two main objectives, first to ensure the sustainability of migratory birds, and second to ensure that their officials, as agents of the Minister of the Environment, fulfill their legal responsibilities.

In the fall of 2002, CWS continued the dialogue with the forestry industry and NGOs and started jointly preparing a second workshop to be held in March 2003. This meeting was attended by a similar mix of people from the forest industry, NGOs (including CNF, Ducks Unlimited, World Wildlife Fund) and CWS (including the science, program and enforcement sections). Provincial natural resources departments (Ontario, British Columbia, New-Brunswick and Alberta) also participated in this second workshop. The focus was to discuss conservation and compliance issues with the MBR. The outcome of the workshop was a general agreement by the participants on a draft framework that could deal with migratory bird conservation within the forestry context. The participants also agreed to task a smaller working group to further develop the draft framework. The smaller working group meets monthly and is preparing recommendations for the end of December 2003. It is envisioned that to implement such a system, regulatory changes would be required to allow the department to consider an approval system to deal with the destruction of nests that may result from industrial operations.

It is therefore, incorrect to state that '[t]he Secretariat received no information from Canada indicating that any such actions had been taken.'

5.5.2 *Compliance Promotion*

Canada stated in its Response to the submission that it is addressing the issue of nest destruction during logging activities, mainly through compliance promotion.⁴²² The Secretariat sought to identify

422. Response at 8. See also the definitions section of the CWS Compliance and Enforcement Policy: "'Compliance' means conformity with the law. Compliance with legislation will be secured through two types of activity: promotion and enforcement.

any and all means adopted by the federal government to ensure migratory bird conservation in a forestry context, with a particular focus on measures applicable to protecting migratory bird nests during logging activities identified by the Submitters.

5.5.2.1 Promoting forest stewardship

In 1998, Wildlife Habitat Canada, the Canadian Forest Service, the Canadian Pulp and Paper Association and MNR launched a pilot “Forest Stewardship Recognition Program” in Ontario, a program that became a fully implemented national program in 2001.⁴²³ The goal of the program is to stimulate awareness and appreciation for stewardship, sustainable practices and forest biodiversity efforts in Canada’s forests by making awards of original artwork to individuals, teams, groups or organizations showing innovation and leadership in biodiversity conservation.⁴²⁴

5.5.2.2 Monitoring migratory bird populations

In 2003, the Canadian Wildlife Service released a draft strategy to develop a national monitoring program for birds in the boreal forest, stating that “[i]t is imperative that a serious undertaking be initiated to meet the challenge of effectively monitoring birds on their breeding grounds in the boreal forest across Canada,” and explaining:

The purpose of this strategy is to map out the principles via which the Canadian Wildlife Service should take a *lead role* in developing a national monitoring program for birds in the boreal forest [emphasis in original]. This strategy is intended to be used to gain *support and endorsement from CWS management* to move forward on this initiative [emphasis in original]. The monitoring program itself will be built in partnership with a range of other public and private agencies.⁴²⁵

Environment Canada believes that compliance can best be achieved by promoting widespread awareness of legislative requirements. The Department ensures that the public is aware of the requirements of its legislation and understands their responsibilities in conserving wildlife and its habitat. ‘Enforcement’ embodies those activities that compel adherence to legal requirements. These activities include: Inspection and monitoring; investigation of violations; issuance of notices to individuals or businesses to require them to correct improper practices; issuance of tickets for violations; seizure of wildlife, or their parts and products, and any item that may have been used to commit the offence; and prosecution.”

423. See online: Forest Products Association of Canada <<http://www.fpac.ca/english/biodiv/stewards/bgdoc.htm>> (date accessed: 12 December 2005).

424. *Ibid.*

425. CWS, “A Strategy to Develop a National Monitoring Program for Birds in the Boreal Forest” (Draft: 18 November 2003) at 1-2.

Regarding the role of partnerships, the draft strategy states:

Partnerships are key. The Canadian Wildlife Service will not be able to achieve a national program alone. In fact, stronger partnerships with other governments, industry, academia, non-government organizations, and communities will lead to a stronger monitoring program with better links to resource management decisions. However, one agency has to take the lead, and that agency should be CWS.⁴²⁶

On the topic of developing new surveys, the draft strategy states:

It is likely that new approaches to data collection will be required. This means surveying birds in areas of the boreal forest that are not being surveyed currently – a daunting task in terms of geographical scale and logistical considerations. It is possible that hundreds or thousands of new sampling locations might be needed. The remoteness and sparse human population will mean that a program relying exclusively on volunteers will not be possible. This has the potential to develop into a very large undertaking.

It is anticipated that 1-2 years would be required for statistical design and protocol development, and another 3-4 years for testing protocols in the field and refining implementation activities through completion of pilot projects. Fortunately, there is already a considerable body of knowledge from the U.S., Canada, and Europe on protocols and large scale survey design issues on which to draw. Other key milestones would include developing data management and dissemination systems and securing stable funding.⁴²⁷

In June 2004, MNR released a “Wildlife Population Program Monitoring Plan.” Under “Impacts of Forest Management Activities on Bird Populations,” the Plan states:

Bird Studies Canada recently completed a project in the Boreal Forest that focused on forest birds. Provincial Wildlife Population Monitoring Program data was used along with other data to assess the impacts of forest management activities on bird populations. The preliminary conclusions suggest that there were no detectable impacts of forest management on the bird populations studied.⁴²⁸

426. *Ibid.* at 3.

427. *Ibid.* at 3-4.

428. MNR Science and Information Branch, “Wildlife Population Program Monitoring Plan – MNR’s Class Environmental Assessment Approval on Crown Lands in Ontario, Condition 30(b)” (June 2004) at 7.

Under “Development of Partnerships and Collaborative Projects,” the Plan states:

Maintaining current and seeking and developing new partnerships and collaborative arrangements is an important aspect of dealing with all program components.

One of the key partnerships to be developed is with Ontario Parks. Unmanaged and control plots need to be identified, located and established, and measurements need to be started to compliment the program on the managed landscape.

Another potential partnership is with the Canadian Wildlife Service. The Canadian Wildlife Service co-ordinates the volunteer Forest Bird Monitoring Program through southern and central Ontario which is complementary to our pilot forest bird survey on our permanent sample plot network.

Continuation of support to our partners is important from the perspective of maintaining the volunteer programs, and for the continuation of long-term time-series databases and our continued participation in collaborative projects.⁴²⁹

In May 2005, an MNR scientist made a presentation to the Provincial Technical Committee entitled “Using forest songbirds to test the effects of local and landscape level patterns on biodiversity.”⁴³⁰

[Name deleted] explained why songbirds might make evaluative indicators. Groups of birds are identified for the full range of landscape conditions such as age, interspersions and cover type. He showed the cost benefit of 3 habitat modeling approaches. He uses 5000 and 50 hectare scales to measure parameters such as bird density. He showed predictions from the models amongst the landscape guideline scenarios. He noted that since different birds have different habitat preferences, a balance is sought. He discussed monitoring and evaluation of scenarios using focal species.

Terminology is important and the word model e.g. projection/ simulation models needs to be used carefully.

[Name deleted]’s recommendations included using data-based spatial habitat models, multiple scale modeling, integrating spatial habitat models with wood supply models, improve stand level habitat-element models, link wildlife monitoring to model testing and adopt an adaptive management framework.

Action: [Name deleted] to provide a website address where information can be viewed. This information would be confidential to the committee.

429. *Ibid.* at 20-1.

430. See MNR, Provincial Forest Technical Committee – Summary of Discussions (12 May 2005) at 6-7.

5.5.2.3 Deciding where to focus conservation efforts

Preliminary steps have been taken by Canada to plan for landbird conservation in Ontario, drawing on the success of the “habitat joint venture” model developed under the North American Waterfowl Management Plan.⁴³¹ In 1995, a partnership of government and non-government agencies produced a bird conservation plan for Ontario, published in 1997 as the Ontario “Flight Plan.”⁴³² Priority species lists for Ontario were produced in 1999, but were not used in the preparation of forest management plans identified by the Submitters.⁴³³ A key issue is determining what constitutes a threat to a species that would trigger the application of conservation measures.⁴³⁴

In response to the submission, Canada stated:

The CWS wants to focus its efforts on species of conservation priority and continue to work collaboratively with stakeholders (NGOs, industry, etc.) to sustain viable populations of migratory birds within the forests of Canada. No federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered. Given the nature of the submission, which references areas in boreal forest to a large extent, it follows that the submitters have not established a case that any threatened or endangered species were involved. Nevertheless, CWS, along with its partners monitor the status of migratory bird populations to identify any species that could become of conservation concern.⁴³⁵

431. See online: North American Waterfowl Management Plan <<http://www.nawmp.ca>> (date accessed: 5 December 2005).

432. PIF Ontario, “Draft Terms of Reference / PIF Ontario Technical Advisory Committee” (September 2003), online: Bird Studies Canada <<http://www.bsc-eoc.org/PIF/Advisory%20Committee%20Terms%20of%20Reference.pdf>> (date accessed: 7 December 2005).

433. Pers. comm. with David Euler (6 December 2005).

434. “Conservation: ‘The management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.’ Conservation includes preservation, maintenance, sustainable use, restoration, and enhancement of populations and habitat;” Wildlife Ministers’ Council of Canada, *A Wildlife Policy for Canada* (adopted by the Wildlife Ministers’ Council of Canada at its meeting on September 26-27, 1990) (Ottawa: Wildlife Ministers’ Council of Canada, 1990) at 29, Glossary. The definition quotes s. 1.4 of the *World Conservation Strategy* formulated by the International Union for the Conservation of Nature and Natural Resources (IUCN) in cooperation with the U.N. Environment Program and World Wildlife Fund. The *World Conservation Strategy* was launched in 1980 in 30 countries.

435. Response to Supplemental Information at 6.

This approach indicates threatened or endangered status as a trigger for federal conservation action. In a journal article published in 1999, a CWS scientist observed:

The Canadian and U.S. systems (for scoring to assess preliminary needs for priority conservation action) include essentially the same scoring criteria (although with different scales and weightings), with the exception of the criterion for “threats.” The latter is routinely incorporated into PIF (Partners in Flight) U.S. scores but is missing from PIF-Canada national scores because threats vary from region to region. Moreover, a species that is already restricted in range or numbers or is severely declining will be ranked high on concern whether or not a cause has been identified. We did not want widespread species with stable populations to be given high concern scores simply because of a potential threat that was not yet affecting population status.⁴³⁶

In a journal article published in 2002, a CWS scientist observed:

The most difficult decision to make with respect to taking action is whether to call for conservation intervention to stop or reverse declines. For species that are globally rare or extremely limited in distribution the decision is straightforward, but it is harder to justify attention to severely declining species that are still relatively widespread and common (such as most of those in Table 2⁴³⁷). For species such as these, we need to agree on defensible population thresholds that signal a need for conservation action when populations fall to lower levels. Such decisions will involve assumptions about desirable population size (e.g., current vs. historic levels). Conservation thresholds should be based on knowledge of the limits of past fluctuations and on species characteristics such as reproductive rate and the ease of restoring lost habitat.⁴³⁸

A decision about desirable population size for migratory bird species is – according to MNR scientists – a precondition to implementing an ecosystem-based approach to forest management, if healthy migratory bird populations is one of the values to be managed for.⁴³⁹

In its environmental policy discussion documents, Canada has provided some insight into how it considers the issue of “threats” when

436. Erica H. Dunn *et al.*, “Priority-Setting Tool Applied to Canada’s Landbirds Based on Concern and Responsibility for Species,” (1999) 13 *Conservation Biology* No. 6, 1404 at 1409.

437. Not reproduced herein. Includes Black-backed Woodpecker and Golden-Crowned Kinglet (see Table 1, above).

438. Erica H. Dunn, “Using Decline in Bird Populations to Identify Needs for Conservation Action,” (2002) 16 *Conservation Biology* No. 6, 1632 at 1636.

439. See s. 5.3.3.2, above.

decisions need to be made about whether to take action. Principle 15 of the 1992 Rio Declaration on Environment and Development states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁴⁴⁰

A 2001 Environment Canada discussion paper entitled “A Canadian Perspective on the Precautionary Approach/Principle – Proposed Guiding Principles” provides:

The precautionary approach recognizes that the absence of full scientific certainty shall not be used as a reason to postpone decisions in the presence of serious harm or irreversible harm.⁴⁴¹

Canada’s 2003 Framework for the Application of Precaution in Science-Based Decision Making about Risk states:

It is particularly relevant that sound scientific information and its evaluation be the basis for (i) the decision to act or not to act (i.e., to implement precautionary measures or not) and (ii) the measures taken once a decision is made.⁴⁴²

The Framework specifies:

Sound scientific information and its evaluation must be the basis for applying precaution [...] In determining what constitutes a sufficiently sound and credible scientific basis, the emphasis should be on providing a sound and credible case that a risk of serious or irreversible harm exists. ‘Sufficiently sound’ or credible scientific basis should be interpreted as a body of scientific information – whether empirical or theoretical – that can establish reasonable evidence of a theory’s validity, including its uncertainties and that indicates the potential for such a risk.⁴⁴³

440. Online: United Nations Environment Programme <<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>> (date accessed: 6 December 2005).

441. Environment Canada, “A Canadian Perspective on the Precautionary Approach/Principle – Proposed Guiding Principles” (September 2001), online: Environment Canada <http://www.ec.gc.ca/econom/booklet_e.htm> (date accessed: 6 December 2005).

442. Government of Canada, *A Framework for the Application of Precaution in Science-Based Decision Making about Risk* (Ottawa: Privy Council Office, 2003) at 7.

443. *Ibid.*

Under the Framework, the burden is on proving through science the existence of a risk of serious or irreversible harm as a prerequisite to deciding to implement a precautionary measure, rather than on proving the absence of such a risk as a prerequisite to engaging in a potentially risky activity. The Framework also states that overall, responsibility for establishing risk “should rest with the party who is taking an action associated with a risk of serious harm (e.g., the party engaged in marketing a product, employing a process or extracting natural resources).”⁴⁴⁴

The Framework establishes as a principle that “[i]t is legitimate that decisions be guided by society’s chosen level of protection against risk.”⁴⁴⁵ While the Framework does not explain how society’s chosen level of protection against risk is determined, it offers the following suggestion:

It should be recognized that some risks are new or emerging and evolution of scientific knowledge may influence society’s tolerances and its chosen level of protection. In such circumstances, public involvement mechanisms that seek the input of those most affected by decisions should help advance understanding of the level of protection against risk.⁴⁴⁶

A Summary of Discussions from a meeting of Ontario’s Provincial Forest Technical Committee at which members discussed a proposal for reviewing Ontario’s forest management planning guidelines for wildlife noted “need to understand level of risk associated with practices – but this is not a science question, it is a political one.”⁴⁴⁷ During a meet-

444. *Ibid.* at 8.

445. *Ibid.* at 7.

446. *Ibid.*

447. MNR, Provincial Forest Technical Committee – Summary of Discussions (30 September 1999) at 4. See also discussion of Landscape Guide development in MNR, Provincial Forest Technical Committee – Summary of Discussions (12 May 2005) at 5, and Jonathan Blavin, “Coping with Tragedies of the Commons: Local Lessons, Global Challenges” (Summary of a presentation made by Professor Elinor Ostrom, Co-Director, Center for the Study of Institutions, Population and Environmental Change, Workshop in Political Theory and Policy Analysis, Indiana University, on 25 February 2000, in the Managing Global Issues Seminar Series), online: Carnegie Endowment for International Peace <<http://www.ceip.org/programs/global/semostrom.htm>> (date accessed: 16 December 2005) at 2: “Characteristics of a Resource Conducive to Self-Organized Management”: *Feasible Improvement*: Resource units are not at a point of deterioration such that it is useless to organize or so underutilized that there is little advantage from organizing; *Indicators*: Reliable and valid indicators of the condition of the resource system are available at a relatively low cost; *Predictability*: The flow of resource units is relatively predictable; *Spatial extent*: The resource system is sufficiently small, given the transportation and communication technology in use, that Users can develop accurate knowledge of external boundaries and internal microenvironments.”

ing of the Provincial Forest Policy Committee, an MNR District Manager explained the role of the local population in providing input on a policy issue:

When asked, what single thing would make this process better, [name deleted] replied that it had been very helpful for the CFSA to enshrine the LCC (local citizens' committee) because it ensures local participation. He commented that policy and legislation are tools that help achieve goals and this is good – but some new approaches can be achieved when staff embrace and support risk taking.⁴⁴⁸

During the review of Ontario's Forest Management Guidelines for Bald Eagles, Ospreys and Great Blue Herons, the following questions and comments were noted at a meeting of the Provincial Forest Technical Committee, showing the interplay of provincial and local interests in considering the need for bird conservation measures:

- Is there a limit to protection when the population is abundant?
- At what point do we change the direction?
- At what scale do you monitor the population? in Ontario, the track record is to monitor at the provincial scale
- Another process available would be to take a species off the Endangered Species list
- Concern expressed that land use planning decisions are to protect the provincial interest, but these may not be the best recommendation for the local area.⁴⁴⁹

In 2003, the Ontario Region of the Canadian Wildlife Service and MNR, both acting through Wildlife Habitat Canada, hired Bird Studies Canada to prepare landbird conservation plans for each of Ontario's four "Bird Conservation Regions" by May 2006 (subject to available funding), under the supervision of the Ontario Landbird Steering Committee.⁴⁵⁰ A schedule to their agreement states: "This prospectus addresses the development of biological plans for landbirds. Development of implementation plans will occur in a subsequent phase."⁴⁵¹

448. MNR, Provincial Forest Policy Committee – Summary of Discussions (7 October 2004) at 2-3.

449. MNR, Provincial Forest Technical Committee – Summary of Discussion (20 October 2004) at 3.

450. Agreement between Bird Studies Canada and Wildlife Habitat Canada dated 27 March 2003.

451. *Ibid.*

In 2004, government agencies in Canada and the United States, along with nongovernmental organizations, acting through “Partners in Flight,” released a North American Landbird Conservation Plan.⁴⁵² The Partners in Flight Mission is: “Helping species at risk / Keeping common birds common / Voluntary Partnerships for birds, habitat, and people.” The Partners in Flight Vision is: “Populations of native birds will occur in their natural numbers, natural habitats, and natural geographic ranges, through coordinated efforts by scientists, government, and private citizens.”

The North American Landbird Conservation Plan states:

Throughout much of Canada and Alaska, the highest priority for conservation action consists of careful planning and implementation of land-use choices that lead to long-term sustainability of the many Species of Continental Importance supported there.⁴⁵³

For the Northern Forest Avifaunal Biome, which encompasses the AOU, the Plan lists a number of conservation issues, the first being “[l]argescale forestry activities, resulting in habitat fragmentation, change in tree-species and age composition, use of pesticides, degradation of forest riparian areas, and fire suppression.”⁴⁵⁴

Under Recommended Actions for the Northern Forest Avifaunal Biome, the Plan states:⁴⁵⁵

- Promote ‘best practices’ guidelines for industry that call for maintaining a mosaic of habitats across this Avifaunal Biome, sufficient in area and forest structure, to maintain healthy populations of all components of the Northern Forest avifauna.⁴⁵⁶
- Develop plans for Northern Forest [Bird Conservation Regions] that do not yet have them.
- Develop improved monitoring for species with a large portion of their range north of the [Breeding Bird Survey]-coverage area.

452. T.D. Rich, C.J. Beardmore, H. Berlanga, P.J. Blancher, M.S.W. Bradstreet, G.S. Butcher, D.W. Demarest, E.H. Dunn, W.C. Hunter, E.E. Inigo-Elias, J.A. Kennedy, A.M. Martell, A.O. Panjabi, D.N. Pashley, K.V. Rosenberg, C.M. Rustay, J.S. Wendt, T.C. Will, Partners in Flight North American Landbird Conservation Plan (Ithaca, NY: Cornell Lab of Ornithology, 2004).

453. *Ibid.* at 27.

454. *Ibid.* at 45.

455. *Ibid.* at 46.

456. See *supra* s. 5.3.3.2.3 and *infra* s. 5.5.2.4.

- Investigate declines in boreal species for which data come from only a small portion of the breeding range, and conduct research on causes of declines.
- Determine importance and limits of the recently expanded range of the Golden-winged Warbler. Continue research on effects of forestry practices on this species to guide management in the northern portions of its range.
- Continue research and management directed at Kirtland's Warbler and Bicknell's Thrush (U.S. and Canadian recovery efforts).
- Expand efforts to identify, protect, restore, and manage critical winter habitat for priority species in Mexico and the rest of Latin America and the Caribbean.
- Determine the status of Smith's Longspur populations and winter habitat availability.
- Conduct research on the importance to migratory species of distribution and quality of stopover habitat south of the Northern Forest.
- Create new partnerships to coordinate conservation actions in nations where birds of the Northern Forest biome winter and through which they migrate.

In October 2004, at the outcome of a workshop intended to lay the groundwork for developing bird conservation plans for the two Bird Conservation Regions of Ontario that cover the AOU, experts from CWS, MNR and elsewhere identified the following conservation issues:

4. Preliminary List of Landbird Conservation Issues in BCRs 8 & 12

Before reviewing the threat scores, the [Technical Advisory Committee] was asked to identify the main conservation issues facing landbirds in the Ontario portions of BCR's 8 and 12. The following issues were identified:

- Forest type conversion, e.g., decline in coniferous dominated forest in BCR 8
- Changes in forest age class structure
- Increase in forest cover and loss of grassland/old field habitats in southern part of BCR 12 due to succession and maturation of abandoned fields
- Conversion of some mixed and hardwood stands in BCR 12 to conifer, especially to increase pine and hemlock to reflect historical occurrence.

- Climate change an issue but likely will not significantly impact habitats in next 30 years
- Fire regime versus harvesting regime, likely more bird habitat available due to improved forestry practices (e.g. leaving snags, downed woody debris).
- Fire suppression has increased the potential for catastrophic fires.
- Expansion of commercial forestry further north (Northern Boreal Initiative, through agreements with First Nations groups, many unknown effects)
- Increased pressure on private land base in southern part of BCR 12 (increase in cottage/recreation use, road network, fragmentation).
- Changes in agriculture in the clay belt area, expansion of agricultural lands, increase in croplands.
- Changes to the air sheds, increase in airborne pollutants, has direct effect on forest health due to leaching of base cations, increased smog, etc.
- Loss of structure in forests that will mature in next 30 years, especially in BCR 8 (due to previous harvesting practices that left few snags, downed woody debris, etc).
- Loss of mixed forest types.⁴⁵⁷

In May 2006, the Bird Studies Canada website contained the following information:

At its broadest level, Partners In Flight (PIF) is a coalition of countries, government agencies, conservation groups, academic institutions, industry and concerned citizens who share a common vision: to maintain the health of landbird populations and their habitats. In Ontario, Partners in Flight is being led by Ontario Region Canadian Wildlife Service and Ontario Ministry of Natural Resources in partnership with Bird Studies Canada. Although international in its scope, Partners In Flight advocates a grass-roots approach where regions develop their own goals and strategies to keep common birds common. Partners In Flight activities within Ontario fit into broader continental wide initiatives that comprise the North American Bird Conservation Initiative (NABCI). As part of NABCI, Partners In Flight supports conservation of migratory landbirds throughout their yearly ranges.

457. Partners in Flight Ontario, BCR 8&12 Technical Workshop Summary (Ontario: Canadian Ecology Centre, 13-15 October 2004) at 3; online: Bird Studies Canada <http://www.bsc-eoc.org/PIF/BCR8%2012_WorkshopSummary.pdf> (date accessed: 29 May 2006).

Over the next three years, biological plans for the conservation of landbirds in Ontario will be written by Bird Studies Canada under the supervision of and with principal funding from the Ontario Region Canadian Wildlife Service and the Ontario Ministry of Natural Resources. It is likely that these plans will be developed as a series of 4 plans staged by Bird Conservation Region, working from south to north. Each of these Landbird Conservation Plans will contain the following information:

- Descriptions of priority landbird species and habitats within each planning region;
- Priority species accounts, including information specific to Ontario (status, threats, knowledge gaps, etc.);
- Priority habitat accounts that describe how much of the habitat exists, where, of what quality, which priority birds use it, and what threats are imminent;
- Descriptions of population and habitat objectives;
- Recommended actions to achieve objectives;
- Identification of specific parts of Ontario where actions should take place and when actions need to be site specific (as opposed to landscape-wide);
- Descriptions of best management practices for landscape wide actions; and
- Development of research and monitoring needs and recommendations.

These plans will identify options/strategies for enhancing landbird conservation that will help guide voluntary conservation efforts. As such, landowners need not fear that the plans will place new restrictions on their lands.

5.5.2.4 Publishing guidance materials on incorporating migratory bird habitat considerations in environmental impact statements and forest management plans

In 1998, the Biodiversity Protection Branch of the Canadian Wildlife Service published the "Environmental Assessment Guideline for Forest Habitat of Migratory Birds,"⁴⁵⁸ which was intended to provide guidance to proponents and forest companies on meeting Environment Canada's expectations regarding addressing migratory bird habitat

458. Ottawa: Minister of Public Works and Government Services Canada, 1998.

considerations in environmental impact statements as well as forest management plans prepared in accordance with the sustainable forest management (SFM) certification standard adopted by the Canadian Standards Association (CSA) in 1996.⁴⁵⁹

In 2001, Wildlife Habitat Canada⁴⁶⁰ reviewed programs for conserving forest wildlife habitats and commented as follows regarding forest certification programs:

Forest certification programs are emerging as key factors in the management of commercial forestlands and as important financial considerations for forest companies. Through certification, companies have an opportunity to provide accredited assurance that they are managing forests under their administration according to high standards. From a habitat perspective, certification standards based on performance, rather than systems criteria, have the best potential to ensure that wildlife habitat considerations are an integral part of forest management.⁴⁶¹

The CSA SFM standard is based on systems criteria.⁴⁶²

459. *Ibid.* at 8, 14, 15, 17, 19.

460. Wildlife Habitat Canada is a national, non-profit, conservation organization established in 1984 by Environment Canada, provincial wildlife agencies and conservation organizations.

461. Wildlife Habitat Canada, "The Status of Wildlife in Canada's Forested Landscapes," (2001-4) at F-10-11.

462. *Ibid.* See also Sierra Club of Canada, "The Canadian Standards Association SFM Standard – Review and Analysis" in "Footprints in the forest – Current practice and future challenges in forest certification" prepared for Fern (Forests and the European Union Resource Network) (2004), online: Sierra Club of Canada <<http://www.sierraclub.ca/national/programs/biodiversity/forests/csa-forest-standards.pdf>> (date accessed: 6 December 2005) at Section 3 "The Development of the CSA SFM Standard": "The standard states that when CSA set out to review the original standard it 'strengthened the conservation representation on its SFM Technical Committee, which now includes representatives from Wildlife Habitat Canada, the Canadian Wildlife Federation, and the Ontario Federation of Anglers and Hunters.' In fact, all three of these groups were on the Technical Committee in 1996 when the first version of the standard was approved, along with the Federation of Mountain Clubs of British Columbia and the Task Force on Churches and Corporate Responsibility. For a brief period in 2001 the Technical Committee did strengthen conservation representation, but those representatives did not endorse the resulting standard. Three major organizations withdrew from the Technical Committee shortly before the revised standard was finalized. The Sierra Club of Canada withdrew in October 2001. Its main reason for resigning hinged on its desire to ensure that the standard, if it is to be promoted as though it is a performance standard, 'meets the Sierra Club's minimum expectations of what an acceptable performance standard must contain. Unfortunately, the explicit refusal by the

In 2002, MNR signed a memorandum of understanding with the Standards Council of Canada (SCC) providing:

MNR acknowledges the value of national accreditation and certification/registration systems coordinated by the SCC. When audited by a SCC accredited RB (registration body), the ISO 14001 combined with CAN/CSA Z809 documents provide significant contributions to verification that an applicant satisfies MNR's sustainable forest management (SFM) regulatory requirements.⁴⁶³

It is assumed that SFM standards require compliance with the law as a baseline, with certified operations exceeding requirements established by law.⁴⁶⁴ Forest management planning in Ontario is not carried out with a view to complying with prohibitions on bird nest destruction contained in the MBR and Ontario's *Fish and Wildlife Conservation Act*.⁴⁶⁵

The Canadian Wildlife Service Environmental Assessment Guideline for Forest Habitat of Migratory Birds does not make reference to compliance with the law (s. 6(a) of the MBR), but it recommends that environmental assessment concepts such as cumulative effects and mitigation measures be considered during forest management planning.⁴⁶⁶ For example, under "cumulative effects," it notes:

There is particular concern when large expanses of the landscape are logged or slated to be logged (e.g., boreal forest). Cumulatively, the result is a net reduction in overall forest habitat, and the potential exists for significant reductions in bird populations or for eventual losses of whole bird communities associated with that type of habitat. Losses of communities may occur, for example, when post-rotational age-classes of trees or riparian habitats are allowed to disappear. In the case of FMPs, proper management should be able to retain all habitat types and bird communities in the same proportions as those found prior to logging.⁴⁶⁷

Technical Committee to consider determining minimum performance expectations (such as thresholds, ranges of variability, restrictions, etc.) makes this impossible. Without meaningful on-the-ground performance requirements the standard cannot offer any assurance of standardized performance levels (other than compliance with the law) and is therefore not an acceptable performance standard."

463. Memorandum of Understanding between the Ontario Ministry of Natural Resources Forests Division and the Standards Council of Canada (7 November 2002) at 4.

464. *Supra* note 462.

465. See s. 5.4, above.

466. Ottawa: Minister of Public Works and Government Services, 1998 at 15.

467. *Ibid.*

The Guideline also recommends that mitigation be implemented:

Mitigation, is defined by the [*Canadian Environmental Assessment Act*] as follows:

“mitigation” means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means.

The basic premise for any mitigation technique or strategy should be avoidance. The proponent should carefully consider the need for a particular component of the project or FMP that would affect migratory birds or their habitat. Relocating a project or activity under the FMP may provide the least disruptive approach. Consideration should be given to the timing of construction and/or project activities that contribute to disturbance. Activities should be avoided during critical periods of the migratory birds’ lifecycles (e.g. nesting or staging).⁴⁶⁸

The Guideline provides the following recommendations for addressing uncertainty in managing forestry impacts on habitat for migratory birds:

Monitoring regimes are needed to determine whether impacts are more than predicted, and to allow for appropriate changes in mitigative measures, if required. The proponent should describe proposed monitoring methods. Generally, they should conform to accepted monitoring practices for the different bird types, but particular methods may be requested by Environment Canada, depending on the specific situation and species in the impact area. For example, the *Canada landbird monitoring strategy* (Environment Canada 1994) has been designed to monitor population changes of landbirds in undisturbed forest habitat and to describe species-habitat associations of forest birds.

For projects that could affect forest habitat at a landscape level, we recommend using both coarse and fine-grained approaches to monitoring migratory bird populations and diversity.

A fine-grained approach is needed to determine the abundance of species in forest of each post-logging age-class in previously logged areas. Particular attention should be paid to priority species, bearing in mind that these species may not be good indicators of population levels of other migratory birds. Verification of the relationships between priority species and the community may be requested, depending on local or regional circumstances.

468. *Ibid.*

The coarse-grained or landscape approach uses changes in forest composition as an indicator of abundance and diversity of migratory birds. Because monitoring will, in part, take place in post-logging age classes approximating seral stages, the relationship between post-logging age classes and natural seral stages of forests needs to be determined to provide confidence in this surrogate measure. Comparisons with migratory bird populations found in natural seral stages in the same landscape at the same time where other parameters are constant would provide a controlled approach to monitoring, and further the degree of confidence.

The degree of ground-truthing for verification should be determined with the regional environmental assessment practitioner of the Environmental Conservation Service of Environment Canada.

The CSA standard for sustainable forests advocates adaptive management to determine whether a management plan is as sustainable as predicted. Managers need to predict changes, monitor and evaluate predictions, and adjust their activities to meet the original goals and values. The goal is, in this case, to maintain populations of migratory birds with a diversity and abundance as close as possible to those contained in the forest habitat prior to development.⁴⁶⁹

The Secretariat contacted a regional environmental assessment practitioner working in Environment Canada's Ontario Region and asked how frequently he received enquiries from the forest industry regarding application of the Guideline during forest management planning.⁴⁷⁰ He said that he had never received such an inquiry.⁴⁷¹ The Secre-

469. *Ibid.* at 17.

470. Pers. comm. with Head, Environmental Assessment Section, Environment Canada – Ontario Region (9 September 2005).

471. *Ibid.* A similar response was provided by federal employees working in the Environmental Conservation Branch of Environment Canada's Ontario Region, when asked about the nature of their interactions with the logging industry from a wildlife enforcement point of view (e-mail exchange between Environment Canada (National Capital Region) and Environment Canada (Burlington) dated 20-21 February 2002). The first said "I'm sorry I can't be more helpful, but I don't know of any cases where the MBCA was used to protect migratory birds against potential threats from logging operations. I've had no interaction with the logging industry to date, in the context of environmental assessment, or from a wildlife enforcement point of view;" and the second said "[m]y response is much the same as [name deleted]. I issue MBCA permits for Ontario Region but I don't have any interaction with the forestry companies in this regard. I know that the Province (MNR) occasionally sent out forestry plan advisory notices to different levels of government and NGOs – re: public input and information sessions – but I haven't seen one of those in a very long time. If memory serves me correct – these would have come out of MNR Sudbury. Don't know of any contact names however."

tariat asked forest management planning professionals whether they used the Guideline in preparing forest management plans; they said no.⁴⁷² When asked about whether they were aware of the Guideline, officials from MNR's Forest Policy Section stated that they were aware of it, but that it is not a document with which they are familiar and that they were not consulted during its development.⁴⁷³

5.5.2.5 Providing expertise through environmental assessment

Though the federal government has not conducted environmental assessments of forestry operations on provincial Crown lands,⁴⁷⁴ the Canadian Environmental Assessment Agency has published research findings relevant to assessing environmental effects of projects on migratory birds.⁴⁷⁵

472. Pers. comm. with staff from Clergue Forest Management Inc. and MNR's Sault Ste. Marie District Office, 27 June 2005.

473. Pers. comm. with Manager, Forest Policy Section, Forest Management Branch, Forests Division, MNR, Sault Ste. Marie, 28 June 2005.

474. In order for an activity to qualify as a project potentially subject to assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, it must be listed in the *Inclusion List Regulations*, SOR/94-637. Under Forests, these regulations reference only forestry activities on federal land (s. 74). However, under Flora and Fauna, the regulations cover, among other things: "48.1 Physical activities that are carried on in Canada outside a national park, national park reserve, national historic site or historic canal and that are intended to threaten the continued existence of a biological population in an ecodistrict, either directly or through the alteration of its habitat, except for activities carried on at or in the immediate vicinity of an airport to ensure the safe operation of aircraft;" and under Fisheries, the regulations cover, among other things: "46. The harmful alteration, disruption or destruction of fish habitat by means of the removal of vegetation in or adjacent to a water body that requires the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act."

475. See "Review and Evaluation of Adaptive Environmental Assessment and Management" prepared by ESSA Environmental and Social Systems Analysts Ltd. for Environment Canada (October 1982); "Using Ecological Standards, Guidelines and Objectives for Determining Significance – An Examination of Existing Information to Support Significance Decisions Involving Wetlands" prepared by Lynch-Stewart & Associates for the Research and Development Monograph Series of the Canadian Environmental Assessment Agency's Research and Development Program (2000); "A Decision Support Tool to Aid in Evaluating Significance of Adverse Effects on Birds for Environmental Assessment" prepared by David Kirk for the Research and Development Monograph Series of the Canadian Environmental Assessment Agency's Research and Development Program (2000); and "Implementing Ecological Management – Using a Bioregional Planning Approach – A Practitioner's Guide (First Draft)" prepared by Richard Laing, IPS (Integrated Planning Service) Ltd. for The Biodiversity Convention Office, Environment Canada (2002).

In its draft Migratory Birds Program Plan (2004), Canada has stated:

Environmental Assessment (EA) is a systematic process to identify potential effects of a development proposal as early in the planning process as possible. This enables adverse effects to be avoided or mitigated, through redesign or project cancellation, before they occur. It also ensures decisions are made with a full understanding of their environmental consequences. EA provides an opportunity for CWS to incorporate conservation measures into project development. Given the importance of protecting birds from the cumulative effects of rapid change, EA is a key tool for the migratory bird program.

To obtain the greatest benefit for bird conservation from its EA interventions, CWS will:

- consider landscape-level objectives for conservation of migratory birds and their habitats in assessing projects
- consider EA requirements in its research planning;
- as appropriate, provide advice through its EA network to:
 - CEAA triggered assessments
 - Provincial EA
 - Forest management initiatives
 - Aquaculture licenses
 - Major mining, commercial fishing, energy development, agricultural or transportation initiatives.⁴⁷⁶

In addition, a core strategy of the Canadian Wildlife Service 2000-2010 Strategic Plan is “Utilization of the landscape or ecosystem approach,” and the Canadian Wildlife Service has adopted a Habitat Conservation Program Strategy under which it intends to “demonstrate and enhance the stewardship of habitat for migratory birds and species at risk,” by “conduct(ing) environmental assessments on the impacts of human activities on wildlife habitat, and recommend(ing) regulatory and mitigative measures as appropriate,”⁴⁷⁷ and by “provid(ing) leader-

476. CWS, “Migratory Birds Program Plan – A component of the Canadian Wildlife Service Strategic Plan” (Draft – June 2004 Version) at 33-34.

477. In its comments on the draft factual record, Canada noted: “This section should not be linked to the last sentence in the paragraph (see comments below). By linking the two it suggests that the reference to ‘conducting environmental assessments on the impacts of human activities on wildlife habitat’ in the Habitat Conservation Program Strategy was a reference to undertaking CEAA assessments. This was not the case. The sentence which states that ‘only Ontario conducts EAs related to forestry

ship and expertise in ecosystem management, land use planning, and habitat stewardship at local, regional, provincial, national, and international levels.⁴⁷⁸ Canada and Ontario have an agreement on environmental assessment cooperation,⁴⁷⁹ but only Ontario conducts environmental assessments related to forestry operations on provincial Crown lands in Ontario.

In 2002, when Ontario's Ministry of the Environment released a draft Declaration Order that would replace – and change the conditions of – the Timber Class EA, Environment Canada provided detailed comments on the draft on several occasions, expressing concerns, in particular, as regards whether the new terms and conditions address Environment Canada's interests regarding migratory birds.⁴⁸⁰

Ontario's Environment Ministry did not change the terms and conditions of the draft Declaration Order as requested by Environment Canada, nor did MNR incorporate Environment Canada's concerns into subsequent amendments to the *Forest Management Planning Manual*.⁴⁸¹ MNR did not grant Environment Canada's request to be represented on

operations on provincial Crown Lands in Ontario' should either be deleted or placed next to the section that provides context for federal environmental assessment, as suggested above." See also *supra* note 474.

478. See CWS, "Habitat Conservation Program Strategy;" online: CWS <<http://www.cws-scf.ec.gc.ca/habitat/default.asp?lang=en&n=C951239D-1>> (date accessed: 5 December 2005). See also Steve Thompson, ed., "Forest Round Table on Sustainable Development" (Final Report) (Ottawa: National Round Table on the Environment and the Economy, 1994) at 21: "The Canadian Wildlife Service is a strong proponent of integrated resource management, and will continue to practice and promote this approach in its wildlife programs. The CWS is leading the development of an implementation strategy for Canada under the Convention on Biodiversity which, by design, will accommodate the multiple values of the forest." But see Environment Canada's *Departmental Performance Report for the period ending 31 March 2003: "Migratory Birds"* "Since 1986, there have been no new resources allocated to this area, while the scope of departmental efforts has expanded significantly. Monitoring efforts show a number of disturbing trends: approximately 35% of landbird species, and roughly two-thirds of the 47 shorebird species, are in decline. Twenty-nine species of birds are on the COSEWIC (Committee on the Status of Endangered Wildlife in Canada) list of endangered or threatened species. There is a growing sense of urgency to address these downward trends." CWS resources were cut by 22% in 1984: J. Alexander Burnett, "A Passion for Wildlife: A History of the Canadian Wildlife Service, 1947-1997," (1999) 113 *Canadian Field Naturalist* No. 1, 1 at 138.
479. See online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/010/0001/0003/0001/0009/index_e.htm> (date accessed: 2 December 2005).
480. Response to Request for Information at Tab 3. All comments were formulated by the Head, Environmental Assessment Section, Ontario Region, Environment Canada.
481. Response to Request for Information at Tab 3.

the Provincial Policy Committee and the Provincial Technical Committee.⁴⁸²

Ontario's Provincial Forest Technical Committee has noted a connection between federal enforcement of federal legislation and a need for federal involvement in developing provincial forestry guidelines that meet the requirements of federal law.⁴⁸³ Regarding the development of new provincial forest management guidelines for the protection of fish habitat, committee members noted: "With the increase of the DFO (Department of Fisheries and Oceans) enforcement activity, it will be very helpful to provide a guideline that is consistent with the federal *Fisheries Act*, and a guideline that can be applied more consistently."⁴⁸⁴ DFO is involved in the development of MNR guidelines for activities involving impacts on fish habitat.⁴⁸⁵

5.5.2.6 Regulating incidental take of migratory bird nests

In its draft Migratory Bird Program Plan, the Canadian Wildlife Service outlines how it proposes to address the issue of migratory bird impacts from forestry. First, it underscores that its focus will be on the maintenance of acceptable population levels and healthy migratory bird communities and ecosystems, meaning that in areas such as the boreal forest, it intends to begin by filling gaps in knowledge regarding migratory bird population status and trends,⁴⁸⁶ as well as species-habitat interactions.⁴⁸⁷ Regarding threats to migratory birds, in its draft Migratory Bird Program Plan, the Canadian Wildlife Service States:

CWS, which must focus a large proportion of its effort on its responsibility for the management of hunted species, has not had the resources to establish the scientific foundation for dealing with the entire range of new threats.⁴⁸⁸

482. *Ibid.*

483. MNR, Provincial Forest Technical Committee – Summary of Discussions (28 February 2001) at 5.

484. *Ibid.*

485. See MNR, Provincial Forest Technical Committee – Summary of Discussions (2-3 May 2001) at 6.

486. CWS, "Migratory Birds Program Plan – A component of the Canadian Wildlife Service Strategic Plan" (Draft – June 2004 Version) at 23.

487. *Ibid.* at 7.

488. *Ibid.* at 14. See also *Regulations Amending the Migratory Birds Regulations*, P.C. 1998-947 (28 May 1998) increasing the price of migratory game bird hunting permits from \$3.50 to \$8.50: "This amendment [...] arises out of commitments in the February 1996 federal budget and the second federal program review exercise to improve the focus of government spending through alternative service delivery and user

Despite these gaps in knowledge, the draft Migratory Bird Program Plan states:

The most important determinant of the sustainability of forest landbirds outside protected areas is the future distribution of forest habitats over the long timeframe of forestry management (which could be 50-100 years). Environment Canada has no direct authority to manage forest habitat planning. Nevertheless, one significant threat faced by forest birds results from incidental take – which we define as the harm caused to birds or nests that occurs through otherwise authorised activities for use of natural resources, such as forestry.⁴⁸⁹

Environment Canada is working on assessing the potential role of earth observation technologies in tracking wildlife habitat and assisting with MBCA enforcement,⁴⁹⁰ and has secured amendments to the MBCA that allow regulations to be adopted to create a permit system for regulating the incidental take of migratory bird nests.⁴⁹¹ While it is too early

fees. [...] Environment Canada also maintains a compliance and enforcement program for its wildlife legislation (the *Canada Wildlife Act*, the *Migratory Birds Convention Act, 1994*, and the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*). The costs of this program exceed \$1 million annually. Although these related programs retain a major focus on game species, they are considered to benefit the general public and thus are not funded through user fees. [...] As a result of Program Review I, from 1995/96 to 1997/98 the migratory birds and other wildlife conservation activities in Environment Canada were reduced by \$5.7 million, for a current total of \$21.8 million. [...] Environment Canada also is concerned about the downward trend in the number of individuals who participate in hunting. [...] Finally, several hunters also pointed out that through the mandatory Habitat Conservation Stamp, they contribute disproportionately for habitat conservation work that benefits all Canadians, not just hunters. [...] Environment Canada recognizes that it will be important to develop, over the mid-term, an initiative that ensures all Canadians contribute equitably to conservation.”

489. CWS, “Migratory Birds Program Plan – A component of the Canadian Wildlife Service Strategic Plan” (Draft – June 2004 Version) at 6.
490. See Canadian Space Agency, “Space for Habitat” (1st year – 2004-05), Government Related Initiatives Program, Project Summary, Sept. 2004.
491. S. 12 (1)(a)(ii) of the MBCA. The *2003-2004 Environment Canada Departmental Performance Report* and the *2004-2005 Environment Canada Departmental Performance Report* both contain the following paragraph, under Sustaining Migratory Bird Populations: “Environment Canada, through the Canadian Wildlife Service, provided advice and support to regular meetings of a joint working group on forestry and migratory birds dealing with legal and conservation issues related to migratory birds incidental take. The goal of the working group, which included members of the forestry industry, provinces, environmental non-governmental organizations and other industries, was to prepare recommendations for senior-level management consideration (submitted April 2nd, 2004).” Online: Environment Canada <<http://www.ec.gc.ca/dpr/2004/en/conserves.cfm>> (date accessed: 5 December 2005).

to know what form this system would take (for example, whether issuance of a permit would trigger an environmental assessment requirement under the *Canadian Environmental Assessment Act*⁴⁹²), CWS has stated: “We envision a process where forest companies meet Environment Canada-set forest bird population objectives through long-term conservation plans.”⁴⁹³

5.5.2.7 Taking part in Ontario’s forest management process

The Secretariat found that in the mid-1990's, after the issuance of the Timber Class EA approval, an employee from the Ontario Region of the Canadian Wildlife Service was one of two federal employees⁴⁹⁴ included in Ontario’s 13-member “Other Wildlife Working Group,” the group tasked by MNR with developing a research agenda for implementing an adaptive management approach to wildlife habitat policy for application to forest management operations in Ontario.⁴⁹⁵ This employee was also part of a team of Canadian Wildlife Service scientists that developed a ranking system to help set priorities for landbird species.⁴⁹⁶ As described more fully above (see s. 5.3.2.1), the research proposal tabled by the Other Wildlife Working Group was not implemented. The Canadian Wildlife Service employee later transferred to the Canadian Forest Service, and as of 24 May 2006, the position he had held at the Canadian Wildlife Service remained vacant.

6. Closing Note

Factual records provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, the NAAEC Parties and other interested members of the public in taking any action they deem appropriate in regard to the matters addressed. Pursuant to Council Resolutions 04-03 and 05-04, this factual record provides information relevant to a consideration of whether Canada is failing to effectively enforce s. 6(a) of the *Migratory Birds Regulations* (“MBR”) adopted under the *Migratory Birds Convention Act, 1994* (“MBCA”) in regard to clearcut logging activities carried out

492. See *Law List Regulations*, SOR/94-636.

493. CWS, “Migratory Birds Program Plan – A component of the Canadian Wildlife Service Strategic Plan” (Draft – June 2004 Version) at 7.

494. The other was employed by the Canadian Forest Service.

495. See s. 5.3.2.1, above.

496. See Erica H. Dunn *et al.*, “Priority-Setting Tool Applied to Canada’s Landbirds Based on Concern and Responsibility for Species,” (1999) 13 *Conservation Biology* No. 6 at 1404.

from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in fifty-three (53) forest management units located in central and northern Ontario. S. 6(a) of the MBR makes it an offence, among other things, to disturb, destroy or take a nest of a migratory bird without a permit. Under the MBR, permits may only be issued for limited purposes such as scientific research.

In developing the factual record, the Secretariat requested information from Canada regarding any actions, including seeking assurances of voluntary compliance and compliance agreements, inspections, and monitoring, taken to enforce s. 6(a) of the MBR in connection with logging identified by the Submitters. The Secretariat received no information from Canada indicating that any such action has been taken. Environment Canada provided the Secretariat with information on multistakeholder workshops held by the Canadian Wildlife Service ("CWS") to promote compliance with s. 6(a) of the MBR. Canada stated that in setting enforcement priorities, it responds to complaints from the public. Canada did not take enforcement action, including on-site inspections or investigations, when a member of the public sent the Canadian Wildlife Service ("CWS") two letters and an e-mail in July 2001 expressing concern about logging scheduled to take place during the migratory bird nesting season under a contingency forest management plan approved by Ontario's Ministry of Natural Resources ("MNR"). The CWS website contains no information on a complaints process for enforcing s. 6(a) of the MBR. Ontario has a process allowing residents to request investigations into alleged violations of environmental laws, but s. 6(a) of the MBR is not on the list of federal laws covered by the process. Ontario has a wildlife conservation act that makes it an offence to destroy nests of wild birds not covered by the MBCA, but Ontario has issued program direction stating that this provision is not intended to change Ontario's approach to ongoing activities such as forest harvesting.

Canada has stated that it wants to focus on species of conservation priority, such as species considered threatened or endangered. Migratory bird population trend monitoring data for the area of Ontario covered by the factual record, an area of roughly forty (40) million hectares, is incomplete as regards forest interior bird species and remote forest areas. Federal scientists are recommending to management that CWS develop and lead a national landbird monitoring program to fill these and other data gaps. Canada has not yet decided whether downward population trends for severely declining species that are still relatively widespread and common should be a trigger for conservation action. Canada is beginning to consider threats to migratory bird populations in

setting regional priorities as part of a voluntary, multistakeholder, monitoring and conservation initiative. Canada has stated that evidence of a connection between logging and a downward trend in migratory bird populations is not determinative of whether enforcement action will be taken, although it added that such information would be considered in determining how to respond to a violation.

Canada stated that in Ontario, logging licenses require industry to protect the environment, and it noted that CWS is aware that Ontario's forestry guidelines contain biodiversity components. Ontario's forest management guidelines require protection of known raptor and great blue heron nests during logging. As regards other birds, under Ontario's forest management system, maintaining preferred habitat for a selection of species is meant to be an indicator of sustainable forest management. The province has set no provincial objectives for migratory bird populations or habitat, and it does not track migratory bird habitat trends associated with implementation of forest management plans. MNR has advised foresters that a forest management alternative (a plan for where and when to log over several decades) will be considered sustainable if preferred habitat for indicator species does not fall more than twenty (20) percent below the lowest amount predicted to occur on the landscape in the absence of human intervention (taking into account natural forces such as wildfires). The Secretariat reviewed forest management plans for the fifty-three (53) forest management units covered by the factual record and found that for the thirty-eight (38) plans containing habitat projections for birds covered by the MBR, habitat is projected to decline for nine (9) of ten (10) species, with declines ranging from 8% (Blackburnian Warbler) to 35% (Pileated Woodpecker). Under Ontario's forest management system, the Pileated Woodpecker is a featured species; providing habitat for this species is meant to address habitat needs for a range of wildlife species associated with mature and old growth forests.

In 2001, at a workshop organized by CWS to promote compliance with s. 6(a) of the MBR, an advisor to the Canadian Forest Products Association presented a paper which states that CWS does not have the resources to strictly enforce s. 6(a) of the MBR and that the preferred option would be for CWS to adopt an enforcement policy exempting forestry from enforcement on the condition of complying with provincial forest management rules containing measures to address migratory bird conservation. The paper concludes that any solution should avoid the use of federal permits because this would create another layer of red tape and open forest management to the federal environmental assessment process. During a process to replace Ontario's rules for protecting

the environment during logging, Ontario's Ministry of Environment did not adopt Environment Canada's recommendations for addressing migratory bird conservation, and MNR has not granted Environment Canada's requests to be represented on provincial forest advisory committees. Environment Canada has stated that adequate obligations do not exist under provincial rules to require MNR to protect Environment Canada's interests in forest management activities in Ontario, including its interest in the conservation and protection of migratory birds.

APPENDIX 1

**Council Resolution 04-03,
dated 12 March 2004
and
Council Resolution 05-04,
dated 1 April 2005**



12 March 2004

COUNCIL RESOLUTION 04-03

Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada is failing to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA) (SEM-02-001).

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

CONSIDERING the above noted submission filed on 6 February 2002, by the Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (United States), Sierra Club of Canada and Wildlands League, all represented by Sierra Legal Defence Fund (SLDF), and the 11 April 2002, response provided by the Government of Canada;

FURTHER CONSIDERING the notification to Council of 12 November 2002, Council Resolution 03-05, the supplemental information provided by the submitters on 20 August 2003, and the response provided by the Government of Canada on 16 October 2003;

HAVING REVIEWED the Secretariat's notification to Council of 17 December 2003, recommending the development of a factual record with respect to the submission;

NOTING that both the supplemental information and Canada's response to that information address clearcutting activities carried out during 2001 in forty-nine (49) forest management units in the Province of Ontario, particularly with respect to the migratory bird nesting season;

RECOGNIZING that five forest management units have been amalgamated and are now part of the forty-nine (49) forest management

units under consideration, and that no logging activities took place on one additional forest management unit;

FURTHER RECOGNIZING that information for four forest management units was not available in time to meet the deadline that was established in Council Resolution 03-05 for submitting additional information and therefore was not provided by the submitters;

NOTING that when submitters provide information, the Party is afforded the opportunity to respond to that information; and

FURTHER NOTING that the submitters may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.

HEREBY UNANIMOUSLY DECIDES TO:

INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters* under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* for the assertions set forth in Submission SEM-02-001 with regard to alleged failures by Canada to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA), in regard to clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in the forty-nine (49) forest management units located in the Province of Ontario identified by the submitters, which include the five that were amalgamated;

DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and with the opportunity to comment on that plan; and

FURTHER DIRECT the Secretariat to consider, in developing the factual record, whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

APPROVED BY THE COUNCIL.

1 April 2005

COUNCIL RESOLUTION 05-04

Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada is failing to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA) (SEM-04-006).

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

CONSIDERING the above noted submission filed on 12 October 2004 by the Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (U.S. and Canada) and Wildlands League, all represented by Sierra Legal Defence Fund (SLDF), and the 7 December 2004 response provided by the Government of Canada;

HAVING REVIEWED the Secretariat's notification to Council of 17 December 2004 which recommended the development of a factual record with respect to the submission, and also recommended, in accordance with Guideline 10.3 of the *Guidelines for Submissions on Enforcement Matters* under Articles 14 and 15 of the NAAEC, that the submission be combined with the Ontario Logging submission (SEM-02-001) for the purpose of developing one consolidated factual record for both;

NOTING that the submission and Canada's response address clearcutting activities carried out during 2001 in four (4) forest management units in the Province of Ontario, particularly with respect to the migratory bird nesting season;

RECOGNIZING the close relationship between this submission and SEM-02-001, as was acknowledged in both the submission and Canada's response;

FURTHER NOTING that, pursuant to Council Resolution 04-03, the Secretariat is currently developing a factual record for SEM-02-001.

HEREBY UNANIMOUSLY DECIDES TO:

INSTRUCT the Secretariat to consolidate this submission (SEM-04-006) with the Ontario Logging submission (SEM-02-001) for the purpose of developing one consolidated factual record for both submissions,

FURTHER INSTRUCT, for greater clarity, the Secretariat to include in the consolidated factual record the four (4) forest management units identified by the submitters in SEM-04-006, with respect to the alleged failure by Canada to effectively enforce Section 6(a) of the MBR in regard to clearcut logging activities carried out from 1 January to 31 December 2001 in those units;

DIRECT the Secretariat to provide the Parties with an amended overall work plan to address the four forest management units identified by the submitters in SEM-04-006 and with the opportunity to comment on the amendments; and

REMIND the Secretariat to otherwise prepare the consolidated factual record in accordance with Council Resolution 04-03.

APPROVED BY THE COUNCIL.

APPENDIX 2

**Overall plan to develop a factual record,
dated 24 March 2004 and amended
overall plan to develop a factual record,
dated 4 April 2005**



Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission I.D.: SEM-02-001 / Ontario Logging

Submitters: Canadian Nature Federation
Canadian Parks and Wilderness Society
Earthroots
Federation of Ontario Naturalists
Great Lakes United
Sierra Club (United States)
Sierra Club of Canada
Wildlands League

Represented by: Sierra Legal Defence Fund

Party: Canada

Date of this plan: 24 March 2004

Background

On 6 February 2002, the Sierra Legal Defence Fund filed with the Secretariat of the Commission for Environmental Cooperation of North America (CEC), on behalf of the Submitters identified above, a submission alleging "the failure of the Canadian Government to effectively enforce subsection 6(a) of the Migratory Birds Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994, against the logging industry in Ontario." Section 6(a) of the MBR makes it an offence to disturb, destroy or take a nest or egg of a migratory bird without a permit. By correlating projected harvest figures for 59 forest management units (FMUs) with available bird census data, the Submitters estimated that clear cutting activity in 2001 destroyed over 85,000 migratory bird nests in central and northern Ontario forests. They alleged that Environment Canada, through its Canadian Wildlife Service (CWS), has taken virtually no action to enforce Section 6(a) of the MBR in regard to this logging activity. Canada responded to the submission on 25 April 2002, and on 12 November 2002, the CEC Secretariat recommended to the CEC Council preparation of a factual record. On 22 April 2003, in Council Resolution 03-05, the Council deferred its consideration of the Secretariat's recommendation pending receipt of additional infor-

mation from the Submitters in support of their allegations. The Submitters provided additional information – including harvest data – to the Secretariat on 20 August 2003. Canada responded to the additional information on 17 October 2003. On 17 December 2003, the Secretariat again recommended that a factual record be developed.

On 12 March 2004, in Council Resolution 04-03, the Council voted unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, for the assertions in submission SEM-02-001 concerning clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in 49 of the 59 FMUs identified in the original submission, including five of the remaining ten FMUs that through amalgamation are now part of the 49 FMUs. Excluded from the scope of the factual record is an FMU whose logging license was revoked (Kiashke River), and four FMUs (Cochrane, Shiningtree, Superior and Temagami Forests) for which the Submitters were unable to obtain harvest data from either the Ontario Ministry of Natural Resources or the logging company. Council Resolution 04-03 notes that the Submitters “may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.”

The Council directed the Secretariat to consider, in developing the factual record, whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, the factual record may include relevant facts that existed prior to 1 January 1994. The Council also directed the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and with the opportunity to comment on that plan.

Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

Overall Scope of the Fact Finding:

To prepare the factual record, the Secretariat will gather and develop information relevant to the facts concerning Canada’s actions

regarding alleged failures to effectively enforce subsection 6(a) of the Migratory Birds Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994, concerning clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in 49 of the 59 forest management units (FMUs) identified in the original submission, including five of the remaining ten FMUs that through amalgamation are now part of the 49 FMUs.

Overall Plan:

Consistent with Council Resolution 04-03, execution of the overall plan will begin no sooner than 5 April 2004. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; nongovernmental organizations; forestry companies that operate in the 49 FMUs; industry associations; and the public to submit information relevant to the scope of fact-finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested nongovernmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). [**April 2004**]
- The Secretariat will request information relevant to the factual record from federal, provincial and local government authorities of Canada, as appropriate, and shall consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). [**April 2004**]
- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. [**April through September 2004**]
- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. [**April through September 2004**]
- The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested nongovernmental organizations or persons, the JPAC or independent experts. [**April through September 2004**]

- In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. **[September 2004 through January 2005]**
- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). **[end of January 2005]**
- As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[March 2005]**
- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

Additional information

The submission, the Party's responses, the additional information provided by the Submitters, the Secretariat determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page <www.cec.org>, or upon request to the Secretariat at the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393 St-Jacques St. West,
Suite 200
Montreal QC H2Y 1N9
Canada

Secretariat of the Commission for Environmental Cooperation

Amended Overall Plan to Develop a Factual Record

Submission I.D.: SEM-02-001 (Ontario Logging) &
SEM-04-006 (Ontario Logging II)

Submitters: Canadian Nature Federation
Canadian Parks and Wilderness Society
Earthroots
Federation of Ontario Naturalists
Great Lakes United
Sierra Club (United States and Canada)
Wildlands League

Represented by: Sierra Legal Defence Fund

Party: Canada

Date of this plan: 4 April 2005

Background

On 6 February 2002, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (CEC) a submission alleging "the failure of the Canadian Government to effectively enforce s. 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario." On 25 February 2002, the Secretariat determined that the submission, SEM-02-001 (Ontario Logging) ("Ontario Logging"), met the requirements of Article 14(1) of the *North American Agreement on Environmental Cooperation* (NAAEC) and merited requesting a response from the Party in accordance with Article 14(2). The Party submitted its response on 25 April 2002. On 12 November 2002, the Secretariat notified the CEC Council that the submission, in light of the Party's response, warranted development of a factual record. On 22 April 2003, in Council Resolution 03-05, the Council voted unanimously:

TO DEFER consideration of the Secretariat's notification of 12 November 2002, pending the following:

- a) the submitters being provided a period of 120 calendar days from the date of this resolution to submit the requisite sufficient information in support of the allegations set forth in SEM-02-001;

- b) the termination of the submission process for SEM-02-001 if the submitters elect not to provide further information within the 120 calendar day time frame;
- c) in the event such further information is provided, the Secretariat determining whether that information warrants a response from Canada or whether the submission process should be terminated;
- d) in the event such a response is requested and provided by Canada, the Secretariat, after considering both the new information provided by the submitters and the response of Canada to that information, notifying Council whether it recommends the preparation of a factual record.

On 20 August 2003, within the 120 calendar day time frame provided in Council Resolution 03-05, the Submitters provided the Secretariat with further information. On 21 August 2003, pursuant to Council Resolution 03-05, the Secretariat determined that the further information provided by the Submitters merited requesting a response from Canada and requested a response. On 16 October 2003, Canada submitted its response. On 17 December 2003, pursuant to Council Resolution 03-05, the Secretariat recommended preparation of a factual record.

On 12 March 2004, pursuant to Council Resolution 04-03, the Council voted to:

INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters* under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* for the assertions set forth in Submission SEM-02-001 with regard to alleged failures by Canada to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA), in regard to clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in the forty-nine (49) forest management units located in the Province of Ontario identified by the submitters, which include the five that were amalgamated; [...]

Regarding four forest management units ("FMUs") for which the Submitters were unsuccessful in obtaining further information within the 120 calendar day time frame provided in Council Resolution 03-05, in Council Resolution 04-03, the Council stated:

FURTHER RECOGNIZING that information for four forest management units was not available in time to meet the deadline that was established in

Council Resolution 03-05 for submitting additional information and therefore was not provided by the submitters;

NOTING that when submitters provide information, the Party is afforded the opportunity to respond to that information; and

FURTHER NOTING that the submitters may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.

On 12 October 2004, the Submitters filed with the Secretariat submission SEM-04-006 (Ontario Logging II) ("Ontario Logging II"), containing additional information regarding the four FMUs that were excluded from the scope of the factual record for Ontario Logging by Council Resolution 04-03 (Cochrane, Shiningtree, Temagami and Wawa, hereinafter "the four FMUs"). On 14 October 2004, the Secretariat asked Canada for a response to Ontario Logging II. Canada provided its response on 8 December 2004. On 17 December 2004, the Secretariat recommended preparation of a factual record for Ontario Logging II, and that the submission be combined with Ontario Logging for the purpose of developing one, consolidated factual record.

On 1 April 2005, in Council Resolution 05-04, the Council voted unanimously to:

INSTRUCT the Secretariat to consolidate this submission (SEM-04-006) with the Ontario Logging submission (SEM-02-001) for the purpose of developing one consolidated factual record for both submissions,

FURTHER INSTRUCT, for greater clarity, the Secretariat to include in the consolidated factual record the four (4) forest management units identified by the submitters in SEM-04-006, with respect to the alleged failure by Canada to effectively enforce Section 6(a) of the MBR in regard to clearcut logging activities carried out from 1 January to 31 December 2001 in those units;

DIRECT the Secretariat to provide the Parties with an amended overall work plan to address the four forest management units identified by the submitters in SEM-04-006 and with the opportunity to comment on the amendments; and

REMIND the Secretariat to otherwise prepare the consolidated factual record in accordance with Council Resolution 04-03.

Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

Overall Scope of the Fact Finding:

To prepare the factual record, the Secretariat will gather and develop information relevant to the facts concerning Canada’s actions regarding alleged failures to effectively enforce s. 6(a) of the MBR in connection with clearcut logging activities carried out in 2001 in the FMUs referenced in Council Resolutions 04-03 and 05-04.

Amended Overall Plan:

Consistent with Council Resolution 04-03, execution of an overall plan to develop a factual record has been ongoing for Ontario Logging since 5 April 2004. The dates provided below are best estimates. The Amended Overall Plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; nongovernmental organizations; forestry companies that operate in the four FMUs; industry associations; and the public to submit information relevant to the scope of fact-finding outlined above as regards the four FMUs. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested nongovernmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). **[April 2005]**
- The Secretariat will request information relevant to the factual record regarding the four FMUs from federal, provincial and local government authorities of Canada, as appropriate, and shall consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). **[April 2005]**
- The Secretariat will gather relevant technical, scientific or other information regarding the four FMUs that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. **[through April 2005]**

- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record regarding the four FMUs. **[through April 2005]**
- The Secretariat, as appropriate, will collect relevant technical, scientific or other information regarding the four FMUs for the preparation of the factual record, from interested nongovernmental organizations or persons, the JPAC or independent experts. **[through April 2005]**
- In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. **[through May 2005]**
- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). **[July 2005]**
- As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[September 2005]**
- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

Additional information

The submissions, the Party's responses, additional information provided by the Submitters, the Secretariat's determinations, the Council Resolutions, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page <www.cec.org>, or upon request to the Secretariat at the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393 St-Jacques St. West,
Suite 200
Montreal QC H2Y 1N9
Canada

APPENDIX 3

Request for information, dated 30 June 2004



Secretariat of the Commission for Environmental Cooperation

Request for Information for Preparation of a Factual Record Submission SEM-02-001 (Ontario Logging) 30 June 2004

Contents

1. The factual record process
2. The Ontario Logging submission and Council's instructions
3. Request for information
4. Examples of relevant information
5. Additional background information
6. Where to send information

1. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created in 1994 under the North American Agreement on Environmental Cooperation (NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the highest-level environmental official in each member country; a Joint Public Advisory Committee (JPAC), composed of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of NAAEC allows persons or nongovernmental organizations in North America to inform the Secretariat by a written submission that any member country (hereinafter a "Party") is failing to effectively enforce its environmental law. This initiates a process of review of the submission, after which the Council may instruct the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of NAAEC, in developing a factual record the Secretariat shall consider any information furnished by a

Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available, submitted by JPAC or by interested nongovernmental organizations or persons, or developed by the Secretariat or independent experts.

On 12 March 2004, in Council Resolution 04-03, the Council decided unanimously to instruct the Secretariat to develop a factual record in connection with submission SEM-02-001 (Ontario Logging), in accordance with Article 15 of NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Guidelines). The Secretariat is now requesting information relevant to matters to be addressed in the factual record. The following sections provide background on the submission and describe the kind of information requested.

2. The Ontario Logging submission and Council's instructions

On 6 February 2002, on behalf of Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (United States), Sierra Club of Canada and Wildlands League (hereinafter the "Submitters"), the Sierra Legal Defence Fund filed with the CEC Secretariat a submission alleging "the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations* (MBR) [adopted under the *Migratory Birds Convention Act, 1994*] against the logging industry in Ontario." Subsection 6(a) of the MBR makes it an offence to disturb, destroy or take a nest or egg of a migratory bird without a permit. By correlating projected harvest figures for 59 forest management units (FMUs) with available bird census data, the Submitters estimated that clear cutting activity in 2001 destroyed over 85,000 migratory bird nests in central and northern Ontario forests. They alleged that Environment Canada (EC), through its Canadian Wildlife Service (CWS), had taken virtually no action to enforce Subsection 6(a) of the MBR in regard to this logging activity. Canada responded to the submission on 25 April 2002, and on 12 November 2002, the CEC Secretariat recommended to the CEC Council preparation of a factual record. On 22 April 2003, in Council Resolution 03-05, the Council deferred its consideration of the Secretariat's recommendation pending receipt of additional information from the Submitters in support of their allegations. The Submitters provided additional information – including harvest data – to the Secretariat on 20 August 2003. Canada responded to the additional information on 17 October 2003. On 17 December 2003, the Secretariat again recommended that a factual record be developed.

On 12 March 2004, in Council Resolution 04-03, the Council voted unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of NAAEC and the Guidelines, for the assertions in submission SEM-02-001 concerning clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in 49 of the 59 FMUs identified in the original submission, including five of the remaining ten FMUs that through amalgamation are now part of the 49 FMUs. The FMUs included within the scope of the factual record are listed in Annex A. Excluded from the scope of the factual record is an FMU whose logging license was revoked (Kiashke River) and four FMUs (Cochrane, Shiningtree, Superior and Temagami Forests) for which the Submitters were unable to obtain harvest data from either the Ontario Ministry of Natural Resources (OMNR) or the logging company. Council Resolution 04-03 notes that the Submitters “may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.” To date, the Secretariat has not received a new submission regarding those four FMUs.

The Council directed the Secretariat to consider, in developing the factual record, whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, the factual record may include relevant facts that existed prior to 1 January 1994. The Council also directed the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and with the opportunity to comment on that plan. The Secretariat published its overall work plan on 24 March 2004.

3. Request for information

The Secretariat seeks information relevant to the facts concerning:

- (i) Migratory bird populations in the FMUs listed in Annex A;
- (ii) Compliance with subsection 6(a) of the MBR in connection with clearcut logging in 2001 in the FMUs listed in Annex A;
- (iii) Canada’s compliance promotion and enforcement of subsection 6(a) of the MBR in connection with clearcut logging activities carried out in 2001 in the FMUs listed in Annex A;

- (iv) Whether Canada is failing to effectively enforce subsection 6(a) of the MBR in connection with clearcut logging activities carried out in 2001 in the FMUs listed in Annex A.

4. Examples of relevant information

This section provides examples of the kind of information that the Secretariat is seeking in connection with the factual record. Information that the Secretariat receives will be considered for inclusion in the factual record. The following examples of potentially relevant information refer to the FMUs listed in Annex A (hereinafter the “FMUs”) and employ the term “clearcut logging” to describe the harvest of all or nearly all merchantable timber:

- (i) Information regarding all species of migratory birds that nest in the FMUs, including information on their populations and their nesting seasons and habits;
- (ii) Information on clearcut logging activities carried out in 2001 in the FMUs. For example, precise information on:
- The data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging;
 - The extent of logging activities by acreage and amount of timber harvested;
 - The timing of logging activities;
 - Reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to logging;
 - Measures taken to protect migratory bird nests during logging;
 - Effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.
- (iii) Information on the provincial laws and regulations pertaining to forest management and planning, including management and planning of logging, that applied to those areas in 2001.
- (iv) Information on the provincial forest management plans (FMPs) that applied to logging in those areas in 2001, including:

-
- The role and outcomes of any consultations with federal officials during the development of those FMPs, as regards compliance with subsection 6(a) of the MBR;
 - Whether the federal guidelines and/or any other federal conditions related to protection of migratory birds and/or their nests are referenced in the FMPs;
 - If so, whether the FMPs require compliance with such conditions;
 - Whether any provincial conditions under those FMPs require compliance with subsection 6(a) of the MBR or equivalent provincial statutory provisions.
- (v) Information on efforts by federal officials to monitor compliance with subsection 6(a) of the MBR in connection with clearcut logging activities carried out in 2001 in the FMUs.
- (vi) Information on EC's policies and practices for ensuring compliance with and enforcing subsection 6(a) of the MBR.
- (vii) Information on the effectiveness of federal enforcement and compliance promotion actions in connection with clearcut logging activities in the FMUs, including:
- How EC established and balanced priorities for wildlife enforcement and MBR compliance promotion in the FMUs;
 - How EC allocated financial and human resources with regard to ensuring compliance with the MBR during logging activities in the FMUs;
 - Information on the current initiatives and programs related to enforcing and promoting compliance with subsection 6(a) in Ontario's forestry sector, specifically with regard to how these initiatives address any compliance issues noted in the FMUs.
- (viii) Information regarding the obstacles or challenges to compliance with subsection 6(a) of the MBR that face logging companies, logging contractors and others involved in the logging of the FMUs.

- (ix) Information on measures adopted by logging companies, logging contractors and others involved in the logging industry to achieve or increase compliance with subsection 6(a) of the MBR, including:
- Information on the nature, extent and timing of measures adopted;
 - Information used to design and evaluate those measures;
 - Overall success of those measures.
- (x) Information regarding the joint effort by CWS, industry and nongovernmental organizations to “develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity,” as referenced in the Response to Supplemental Information.¹ For example, precise information on:
- Any compliance promotion activities carried out by CWS that would apply to logging in the FMUs;
 - The three workshops on migratory bird conservation held between October 2001 and March 2003. Helpful information would include meeting agendas, meeting minutes, related correspondence and a copy of the draft (and any final) framework to deal with migratory bird conservation in the forestry context.
- (xi) Information regarding any special consideration given to threatened or endangered species in enforcing subsection 6(a) of the MBR, and the legal and/or policy basis for focusing on species of conservation priority in Canada’s enforcement of subsection 6(a) of the MBR.
- (xii) Information regarding the role of complaints from the public in the enforcement of subsection 6(a) of the MBR. For example, information on:
- Resources expended by EC to respond to complaints, compared to resources expended in carrying out routine inspections;
 - The role of CWS consultation with the OMNR in the enforcement of subsection 6(a) of the MBR;

1. Government of Canada, “Response to supplemental information submitted to the Secretariat of the Commission for Environmental Cooperation” (16 October 2003) at 4.

- The timing of CWS follow-up to complaints from the public and any effects thereof on the ability of the CWS to gather evidence of violations of subsection 6(a) of the MBR;
- The type of information required for a complaint from the public to lead to enforcement action by the CWS;
- Whether and how the CWS has followed up on the Submitters' allegation that an estimated 43,700 nests were destroyed by clearcut logging.

(xiii) Any other technical, scientific or other information that could be relevant.

5. Additional background information

The submissions, Canada's responses, the Secretariat's determinations, the Council Resolutions, the overall plan to develop the factual record and other information are available in the Citizen Submissions on Enforcement Matters page of the CEC web site: <<http://www.cec.org/citizen>>. These documents may also be requested from the Secretariat.

6. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 30 September 2004, by e-mail to <info@ccemtl.org> or by regular mail to the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393 St-Jacques St. West,
Suite 200
Montreal QC H2Y 1N9
Canada
Tel. (514) 350-4300

Please reference SEM-02-001 (Ontario Logging) in all correspondence.

For any questions, please call (514) 350-4300 or send an e-mail to the attention of Doris Millan, at <info@ccemtl.org>.

Annex A

List of Forest Management Units within the scope of the factual record:

Algoma Forest	Armstrong Forest
Bancroft and Minden Forest	Big Pic Forest
Black River Forest	Black Sturgeon Forest
Brightsand Forest	Caribou Forest
Dog River – Matawin Forest	Driftwood Forest
Dryden Forest	English River Forest
Flanders Fort Frances Forest	French-Severn Forest
Gordon Cosens Forest	Hearst Forest
Highrock Forest	Iroquois Falls Forest
Kenogami Forest	Kenora
Lac Seul Forest	Lake Nipigon Forest
Lakehead Forest	Mazinaw-Lanark Forest
Magpie Forest	Moose River
Nagagami Forest	Nakina North Forest
Nipissing Forest	Northshore Forest
Ogoki Forest	Ottawa Valley Forest
Pic River Ojibway Forest	Pineland-Martel Forest
Red Lake Forest	Romeo Malette Forest
Sapawe Forest	Smooth Rock Falls
Spanish	Spruce River Forest
Sudbury Forest	Superior Forest
Temiskaming	Timmins
Timmins Forest	Trout Lake Forest
Wabigoon Forest	Whiskey Jack Forest
White River Forest	

The following 5 FMUs were listed in the original submission. Through amalgamation, they are now included in the listed 49 FMUs:

- Auden Forest (*amalgamated into the Lake Nipigon Forest*)
- Elk Lake (*amalgamated into the Temiskaming Forest*)
- Kapuskasing (*amalgamated into the Gordon Cosens Forest*)
- Upper Spanish Forest (*amalgamated into the Spanish Forest*)
- Watabeag (*amalgamated into the Temiskaming Forest*)

APPENDIX 4

**Request for information and request for
additional information, dated 5 May 2005**



Memorandum

DATE: 5 May 2005
À / PARA / TO: Environment Canada
CC:
DE / FROM: Legal Officer
Submissions on Enforcement Matters Unit
**OBJET /
ASUNTO /RE:** Request for Additional Information
SEM-02-001 (Ontario Logging) & SEM-04-006
(Ontario Logging II) Factual Record

I am writing to request additional information from Canada in connection with the consolidated factual record for submissions SEM-02-001 (Ontario Logging) and SEM-04-006 (Ontario Logging II), consistent with NAAEC Article 21. The questions are based on Canada's responses to the submission and supplemental information, and they seek to clarify and in some cases update information received from Canada in those responses and in Canada's response to the Secretariat's June 2004 Information Request. Information that is responsive to these questions is intended to allow for an informed consideration of the evolving context in regard to enforcing and promoting compliance with s. 6(a) of the *Migratory Birds Regulations* (MBR) with respect to logging activities. This context includes the current status of efforts initiated in early 2001 to address the taking of nests during logging. This additional information will greatly assist the Secretariat in ensuring the accuracy and completeness of the draft factual record.

We request Canada's answers, and copies of supporting information (if any), for each of the questions listed below. An indication of the documents supporting each answer would be very helpful. If Canada has already provided supporting information, please identify the information that is responsive to a particular question. If requested information has not been or will not be provided (including on a confidential basis) because it is non-existent, confidential or privileged, or otherwise unavailable, please provide an explanation consistent with NAAEC Article 21(3). We appreciate Canada's consideration of these questions.

The Secretariat would also appreciate meeting with the following persons, at their earliest convenience, to discuss Canada's approach to

enforcing and ensuring compliance with s. 6(a) of the MBR in connection with forest harvest operations covered by the factual record: Trevor Swerdfager, Steve Wendt, Yvan Lafleur and Susan Waters; Peter Blancher, Erica Dunn, Judith Kennedy, Robert Milko, Robert Dobos, H el ene L evesque, and a representative of the Ontario Landbird Steering Committee; and Silke Neve. If there are persons whose work is relevant to this information request whose names have not been listed, we would appreciate meeting with them as well.

Please do not hesitate to contact me at (514) 350-4337 if clarifications are required regarding any of the questions.

**SEM-02-001 (Ontario Logging) &
SEM-04-006 (Ontario Logging II)
Factual Record**

REQUEST FOR ADDITIONAL INFORMATION

5 May 2005

1. For the four forest management units referenced in submission SEM-04-006 (Ontario Logging II), please provide information that is responsive to the questions contained in the Secretariat's June 2004 Request for Information.
2. Please describe what factors would be considered in evaluating a due diligence defense in connection with a violation of s. 6(a) of the MBR during logging.
3. Environment Canada's departmental performance reports for 2001-2002 and for the period ending March 31st, 2003 make reference to the development of a Migratory Birds Program Strategy and Migratory Bird Program Plan.

Q3.1: The Secretariat requests a copy of any draft or final Migratory Birds Program Strategy or Plan.

4. Please describe how, if at all, CWS applies Canada's Framework for the Application of Precaution in Science-based Decision Making about Risk in setting migratory bird conservation priorities based on biological information, as regards risks to migratory birds posed by logging in Canada.
5. To allow for a better understanding of resource allocation decisions being made regarding federal approaches (including scientific research, compliance promotion, and enforcement) for achieving migratory bird conservation in the areas of central and northern Ontario covered by the factual record, the Secretariat requests information regarding any estimates developed, and any agreements regarding responsibility for:

Q5.1: the cost of gathering and analyzing data on migratory bird populations, population trends, and habitat requirements on public land in Ontario allocated to forestry companies for logging;

Q5.2: the cost of assessing logging impacts on migratory bird populations, population trends, and habitat in Ontario;

Q5.3: the cost of making such information available to the forest industry for forest management planning in Ontario.

6. Appendix 3 of Canada's Response to the Secretariat's Request for Information for the Factual Record for Submission SEM-02-001 (Ontario Logging) contains copies of letters by which Environment Canada provided comments to the Ontario Ministry of Natural Resources regarding the renewal of Ontario's class environmental assessment for forestry operations.

Q6.1: To what extent did Ontario honour Environment Canada's request (17 June 2002) that federal agencies, including Environment Canada, be included in key forest management planning activities, such as the Advisory Committees and Forest Technical Committee?

7. Correspondence included in Appendix 3 to Canada's Response to the Secretariat's Request for Information (letter to Blair Rohaly dated 11 April 2003) states that adequate obligations do not exist in the Terms and Conditions of Ontario's Forestry Class Environmental Assessment Approval Declaration Order to address the interests of Environment Canada, including the conservation and protection of migratory birds.

Q7.1: Please provide information regarding obligations that, in Canada's view, would address the interest of Environment Canada in the conservation and protection of migratory birds.

8. In Canada's Response to Supplemental Information (16 October 2003 at p. 6), Canada states: "No federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered. Given the nature of the submission, which references areas in the boreal forest to a large extent, it follows that the submitters have not established a case that any threatened or endangered species were involved. Nevertheless, CWS, along with partners, monitors the status of migratory bird populations to identify any species that could become of conservation concern."

In a paper submitted for publication in May 2001 entitled "Using Decline in Bird Populations to Identify Needs for Conservation Action" (*Conservation Biology*, vol. 16, no. 6 (December 2002) 1632 at

1636), a CWS scientist points out that most of the North American bird species with global population declines that qualify for conservation status according to the World Conservation Union are still relatively widespread and common. She remarks that “[a] large part of the job will be developing a consensus on how much decline is acceptable before intervention should take place.”

Environment Canada’s Compliance and Enforcement Policy for Wildlife Legislation (1998) states that in deciding how to respond to violations, enforcement officers will consider the nature of the violation, including how endangered the species is and the degree of harm or potential harm to Canadian ecosystems (p. 16). Likewise, the policy states that prosecution may be recommended when there is or has been serious damage to a Canadian ecosystem or species; the actions of the accused are or have been detrimental to the survival of the species or the management of the site involved; the accused knowingly committed an offence or provided false or misleading information, pretending to comply with an Act; or the accused obstructed an officer in carrying out duties or responsibilities under legislation (p. 19).

In Canada’s Response to the Secretariat’s Request for Information for the Factual Record for Submission SEM-02-001 (Ontario Logging) (1 November 2004 at p. 7), Canada states: “Note that the conservation priorities, which are based on biological information about Ontario forest bird populations or their status at the time of the complaints, did not support changing the approach being taken in the enforcement of paragraph 6(a) with regards to logging activities.”

As regards the application of s. 6(a) of the MBR to destruction of migratory bird nests during logging:

Q8.1: What connection is there, if any, between the taking of enforcement action and the availability of information demonstrating downward trends in populations of forest-dwelling migratory bird species?

Q8.2: What connection is there, if any, between the taking of enforcement action and the availability of information demonstrating a connection between logging and a downward trend in migratory bird populations?

9. In Canada's Response to Supplemental Information (16 October 2003 at p. 6), Canada states: "[R]egulatory changes would be required to allow the department to consider an approval system to deal with the destruction of nests that may result from industrial operations."

Q9.1: Please describe what type of regulatory changes, and what type of approval system, are contemplated by this statement.

10. Bird Studies Canada is under contract with Wildlife Habitat Canada (27 March 2003) to develop biological plans for landbirds in Ontario's bird conservation regions.

Q10.1: Please describe how – if at all – the NABCI/PIF (North American Bird Conservation Initiative/Partners in Flight) planning process is coordinated with the process of allocating land for /withdrawing land from logging in Ontario.

APPENDIX 5

**Provisions for land use plans
on crown lands in Ontario**



Appendix 5 Provisions for land use plans on crown lands in Ontario

Public Lands Act, R.S.O. 1990, c. P.43:

Zoning plans

12. (1) For the purpose of the management of public lands, the Minister may from time to time establish classes of zones, such as “Open”, “Deferred”, “Closed” or otherwise as the Minister considers proper, may define the purposes for which public lands of each class may be administered, may cause areas of public lands to be laid down on maps or plans and may designate such areas as zones, and any area of public lands so designated shall be administered only for the purposes defined for the designated class of zone. R.S.O. 1990, c. P.43, s. 12(1).

Plan of subdivision may be required

(2) The Minister may designate areas in which the public lands are not open for disposition as summer resort locations until a plan of subdivision of the lands to be disposed of is registered under the *Land Titles Act* or the *Registry Act*. R.S.O. 1990, c. P.43, s. 12(2).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 12 is repealed by the Statutes of Ontario, 1998, chapter 18, Schedule I, section 49 and the following substituted:

Designating planning units

12. (1) The Minister may designate all or any area of public land as a planning unit and the Minister may require that a land use plan be prepared for the planning unit.

Advisory committees

(2) The Minister may establish advisory committees to participate in the preparation and implementation of land use plans.

Guidelines

12.1 (1) A land use plan shall be prepared in accordance with the land use planning guidelines approved by the Minister.

Provisions

(2) The guidelines shall contain provisions respecting,

(a) the contents and preparation of land use plans, including public involvement and decision-making processes; and

(b) the establishment of zones to define the purposes for which public land, water and natural resources within each zone may be managed.

Land use plans**Approval required**

12.2 (1) A land use plan is of no effect unless approved by the Minister.

Minister's powers

(2) The Minister may approve the plan, reject it or approve it with such modifications as the Minister feels appropriate.

Ministerial amendments

(3) The Minister may, at any time, amend, in accordance with the land use planning guidelines, a land use plan that the Minister previously approved.

Proposal by Minister

(4) If the Minister proposes to approve or to amend an approved land use plan, the Minister shall give notice of the intent in accordance with the land use planning guidelines.

Objections

12.3 (1) Any person may object to a proposed approval of or a proposed amendment to a land use plan by giving written notice to the Minister within 30 days after the day that the Minister's notice of intent is published.

Review

(2) The Minister may designate one or more individuals or a board, commission or agency to review the objection and make a report to the Minister setting out recommendations.

Minister's decision

(3) After considering the report, the Minister may take such action as the Minister considers appropriate and shall notify the objector in writing.

Decision final

(4) The decision of the Minister is final.

Non-application of R.S.O. 1990, c. S.22

(5) The *Statutory Powers Procedure Act* does not apply to reviews under this section.

Guidelines

(6) The Minister may establish guidelines with respect to reviews under this section.

Consistent activities

12.4 (1) All activities carried out within a planning unit shall be consistent with the land use plan approved for the planning unit.

Objections

(2) Any person may object to an activity that is inconsistent with the land use plan by giving the Minister written notice and the Minister may refer the objection to the individual or body designated under subsection 12.3(2) for review and preparation of a report with recommendations.

Ministerial order

(3) The Minister may, by order, require any person to stop any activity that, in the opinion of the Minister, is inconsistent with a land use plan.

Compliance

(4) No person shall contravene or fail to comply with the Minister's order.

See: 1998, c. 18, Sched. I, ss. 49, 66(4).

APPENDIX 6

**FMPs excluded from the
Table FMP-5 analysis**



Appendix 6 FMPs excluded from the Table FMP-5 analysis

Instead of filling out Table FMP-5 as instructed by the FMPM, the plan author for the Sapawe FMU compared the amount of habitat available in the future to the amount of habitat that would be available if the forest were only disturbed by fires. This was the only plan that used this approach and because it was different from all other plans, the data were not used in the analysis. Table FMP-5 in the Red Lake, Watabeag and Wabigoon plans had obvious typographical or other errors and were therefore not included in the analysis in order to avoid distortions in the results. For example, Table FMP-5 in the Red Lake Plan (1998-2003) reported the following numbers for a planning area of 3,115 km²:

Species	Amount of current habitat in km ²	Desired amount of habitat in future in km ²
Pileated Woodpecker	87	88
Boreal Chickadee	569	548
Golden Crowned Kinglet	569	548
Swainson's Thrush	1098	1218
American Redstart	1098	1218

It is impossible for the Boreal Chickadee and the Golden Crowned Kinglet to have exactly the same amount of habitat, both now and in the future. The same is true for Swainson's Thrush and American Redstart. These are probably typographical errors, or an error made by someone in copying information from one document to another. In the Watabeag plan, the following is reported in Table FMP-5 for a planning area of 2,131 km²:

Species	Amount of current habitat in km ²	Desired amount of habitat in future in km ²
Pileated Woodpecker	1	11
Boreal Chickadee	20	49
Ruby Crowned Kinglet	148	106
Least Flycatcher	117	106
Bay Breasted Warbler	239	179

The plan reports only 1 km² of habitat for Pileated Woodpecker at the beginning of the plan, which doesn't make sense. The geographic area covered by this plan contains the normal range of habitat conditions for this species and therefore this low number cannot be correct. In addition, the fact that projected future habitat for Ruby Crowned Kinglet and Least Flycatcher is identical indicates that this table is unreliable. Therefore data from this table were not included in the analysis.

The Wabigoon plan did not contain a complete Table FMP-5. It only reported on habitat for Pileated Woodpecker, and out of a planning area of 7,285 km², only 2.2 km² were classified as habitat for this bird at the beginning of the plan, and only 1.3 km² of habitat was desired in the future. This does not make sense, and therefore data from this table is considered unreliable and was not included in the analysis.

APPENDIX 7

**Fiona K.A. Schmiegelow, “Forest Management
Planning and Migratory Birds in Ontario”
(May 2005) [unpublished] – References**



Appendix 7 Fiona K.A. Schmiegelow, “Forest Management Planning and Migratory Birds in Ontario” (May 2005) [unpublished] – References

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APPENDIX 8

Acronyms and defined terms





Appendix 8 Acronyms and defined terms

Acronyms

AOC	Area of Concern
AOU	Area of the Undertaking covered by the Timber Class EA
BBS	Breeding Bird Survey
BCR	Bird Conservation Region
CEAA	<i>Canadian Environmental Assessment Act</i> , S.C. 1992, c. 37
CEC	Commission for Environmental Cooperation of North America
CFSA	<i>Crown Forest Sustainability Act, 1994</i> , S.O. 1994, c. 25
CNFER	Centre for Northern Forest Ecosystem Research (Lakehead University)
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
CSA	Canadian Standards Association
CWS	Canadian Wildlife Service
DFO	Department of Fisheries and Oceans (Canada)
DLUGs	District Land Use Guidelines
EBR	<i>Environmental Bill of Rights, 1993</i> , S.O. 1993, c. 28
EC	Environment Canada
ELC	Ecological Land Classification
EMA	Enhanced Management Area
ENGO	Environmental Nongovernmental Organization
FERN	Forests and the European Union Resource Network
FFT	Forests for Tomorrow
FMA	Forest Management Agreement
FMP	Forest Management Plan
FMU	Forest Management Unit
FRAP	Ontario's Forest Resources Assessment Policy
FRI	Ontario's Forest Resources Inventory
FMPM 1996	Ontario's 1996 <i>Forest Management Planning Manual</i>
HSA	Habitat Supply Analysis
HSM	Habitat Supply Model

HU	Wildlife Habitat Unit
IUCN	International Union for the Conservation of Nature
LCC	Local Citizens' Committee
MBCA	<i>Migratory Birds Convention Act</i> , 7-8 Georg V, c. 18
MBCA, 1994	<i>Migratory Birds Convention Act, 1994</i> , S.C. 1994, c. 22
MBR	<i>Migratory Birds Regulations</i> , C.R.C., c. 1035
MNR	Ontario Ministry of Natural Resources
MOE	Ontario Ministry of Environment
NAAEC	<i>North American Agreement on Environmental Cooperation</i>
NRVIS	Ontario's Natural Resource and Values Information System
OFAAB	Ontario Forest Accord Advisory Board
OFAH	Ontario Federation of Anglers and Hunters
PFPC	Provincial Forest Policy Committee
PFTC	Provincial Forest Technical Committee
PIF	Partners in Flight
PLA	<i>Public Lands Act</i> , R.S.O. 1990, c. P.43
RNRS	Regional Natural Resource Strategy
RSA	Resource Stewardship Agreement
SCC	Standards Council of Canada
SCR	Southcentral Region
SFL	Sustainable forest license issued under the CFSA
SFM	Sustainable Forest Management
SFMM	Ontario's Strategic Forest Management Model
T&C	Term and Condition under the Timber Class EA
WAP	Ontario's Wildlife Assessment Program

Defined Terms

Compliance and Enforcement Policy	Canada, "Compliance and Enforcement Policy for Wildlife Legislation" (Ottawa: Minister of Public Works and Government Services, 1998)
Constitution	<i>Constitution Act, 1867</i> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5

Convention	<i>Migratory Birds Convention, 1916, United Kingdom and United States, 16 August 1916 (Schedule to the MBCA)</i>
Interpretation Document	Canada, "Interpretation Document of the Canadian Delegation for the 1995 Parksville Protocol Amending the Migratory Birds Convention" (Ottawa: CWS, 2000)
Parksville Protocol	Protocol between the Government of Canada and the Government of the United States of America amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, S.C. 1994, c. 22, Sch.; SOR/2000-189
Request for Information	Information request dated 30 June 2004, prepared by the Secretariat for the preparation of the factual record
Request for Additional Information	Request for additional information for the preparation of the factual record dated 5 May 2005, prepared by the Secretariat and addressed to Canada
Response	Canada's 11 April 2002 response to the submission
Response to Request for Information	Canada's 2 November 2004 response to the Request for Information
Response to Request for Additional Information	Canada's 6 September 2005 response to the Request for Additional Information
Response to Supplemental Information	Canada's 16 October 2003 response to additional information provided by the Submitters
Secretariat	CEC Secretariat

Submission	SEM-02-001 (Ontario Logging), filed with the Secretariat by Sierra Legal Defence Fund on behalf of the Submitters on 2 February 2002
Submitters	Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (United States), Sierra Club of Canada, and Wildlands League
Supplementary Submission	Additional information filed with the Secretariat by Sierra Legal Defence Fund on behalf of the Submitters on 20 August 2003, pursuant to Council Resolution 03-05
Timber Class EA	Class Environmental Assessment by MNR for Timber Management on Crown Lands in Ontario
Timber Class EA Reasons for Decision and Decision	Timber Class EA Reasons for Decision and Decision of the Environmental Assessment Board of Ontario (EA-87-02), released on 20 April 1994
2000 Report on Guidelines Review	ArborVitae Environmental Services Ltd. <i>et al.</i> , "Review of Forest Management Guides" (submitted to The Provincial Forest Technical Committee (Ontario)) (31 May 2000)

ATTACHMENT 1

**Council Resolution 07-02,
dated 31 January 2007**



31 January 2007

COUNCIL RESOLUTION 07-02

Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submissions SEM-02-001 (Ontario Logging)/SEM-04-006 (Ontario Logging II)

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING RECEIVED the final factual record for Submission SEM-02-001/SEM-04-006;

NOTING that pursuant to Article 15(7) of the NAAEC, the Council is called upon to decide whether to make the factual record publicly available; and

AFFIRMING its commitment to a timely and transparent process;

HEREBY DECIDES:

TO MAKE PUBLIC and post on the registry the final factual record for Submissions SEM-02-001 and SEM-04-006;

TO ATTACH to the final factual record comments provided by Canada, the Province of Ontario, and the United States of America to the Secretariat on the draft factual record; and

TO INCLUDE with the final factual record a disclaimer which states that the document was prepared by the Secretariat, and that the views contained therein do not necessarily reflect the views of the governments of Canada, Mexico or the United States of America.

APPROVED BY THE COUNCIL:

Judith E. Ayres
Government of the United States of America

Enrique Lendo Fuentes
Government of the United Mexican States

David McGovern
Government of Canada

ATTACHMENT 2

Comments of Canada





May 16, 2006

Commission for Environmental Cooperation
393, rue St-Jacques, ouest
Bureau 200
Montréal, QC H2Y 1N9

Dear Mr. Kennedy:

Canada was pleased to review the draft Factual Record in relation to Submission on Enforcement Matters SEM-04-006 (the "Ontario Logging" submission), pursuant to Article 15(5) of the North American Agreement on Environmental Cooperation (NAAEC).

In order to assist the Secretariat in the development of the final Factual Record for this submission, I would like to provide Canada's comments, which you will find attached. You will note that these comments include the letter and appended table that were sent directly to you by the Ontario Ministry of Natural Resources and which form part of Canada's comments.

Furthermore, I would like to highlight the following general comments which we have with respect to this Factual Record.

- 1) Information related to the province of Ontario which is not a signatory to the *Canadian Intergovernmental Agreement (CIA) Regarding the North American Agreement for Environmental Cooperation (NAAEC)*

As you are aware, the NAAEC contains a federal state clause in Article 41 which provides that Canada, a federal state with shared constitutional jurisdiction over the environment, shall be bound in respect of all matters falling within federal jurisdiction, as well as matters within provincial jurisdiction as regards to those provinces who have been identified in a declaration delivered by Canada to the other Parties to the NAAEC. That declaration reflects the outcomes of federal-provincial consultations in Canada, which are codified in the *Canadian Intergovernmental Agreement Regarding the NAAEC* (the "CIA"). Article 2 of the CIA states that the provincial signatory governments "shall enjoy the rights of the NAAEC and shall be bound by its obligations in accordance with their respective jurisdictions."

Ontario is not identified in the declaration filed by Canada in accordance with Annex 41 of the NAAEC. As such, Canada is not bound

under international law with respect to matters falling within Ontario's jurisdiction over the environment. However, we note that the vast majority of the 108 pages in this draft Factual Record are dedicated to an examination of Ontario's regulation of the logging industry and Ontario's laws, policies and practices regarding environmental protection of habitat in logging areas. Canada considers that this is excessive and inappropriate considering that Ontario is not bound by the NAAEC. Furthermore, the magnitude of the focus on Ontario may leave the reader with the inaccurate impression that the province of Ontario is responsible for the administration and enforcement of the *Migratory Birds Convention Act, 1994* (MBCA).

We recognize that consideration of how the Government of Canada's enforcement of section 6(a) of the *Migratory Bird Regulations* was influenced by the Ontario government's enforcement practices and policies may be relevant to the scope of the Factual Record. However, in its response of April 11, 2002, the Government of Canada does not refer to or rely on the enforcement policies or procedures of the Ontario Government in responding to the assertions contained in the submission. Moreover, as noted in that response, "approval of a provincial FMP (forest management plan) does not absolve companies of their responsibilities toward the federal MBCA." Accordingly, the scope of the discussion of Ontario's legislative and regulatory framework should be limited to those matters which have a direct link to the Government of Canada's enforcement policies and practices, since that is the focus of the factual record.

Furthermore, Council Resolution 04-03 did not specify that an examination of Ontario's forestry management practices would be subject to the Factual Record process. Again, Canada would like to highlight the importance of the Factual Record conforming to the instructions provided by the Council, which in this case was "... to prepare a factual record ... with regard to alleged failures by Canada to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) ... in regard to clearcut logging activities [...] in the forty-nine (49) forest management units located in the Province of Ontario...".

Accordingly, Canada is requesting that the Secretariat amend the draft factual Record in order to accurately reflect the parameters provided by the Council Resolution 04-03, and in order to respect the provisions of the NAAEC as regards to the application of the NAAEC to the provinces of Canada.

2) Maintaining Objectivity in the Factual Record

Factual Records are intended to present factual information related to the allegations raised in a submission in an objective manner. To this end, Article 15(4) of the NAAEC specifies the type and scope of information which the Secretariat may consider in preparing a Factual Record.

First, Canada is of the view that the opinions of stakeholder advocacy groups which provide analysis for their own internal use compromises the objectivity of the factual record. Information regarding an advocacy group's preferred government policy option has clear biases, and, therefore should not be accorded the level importance that is demonstrated by including this viewpoint at the end of both the Executive Summary as well as in the Concluding Note. Furthermore, this commentary is grounded in hypothetical scenarios, not actual facts, as would be appropriate for a factual record. Second, at various instances in the draft Factual Record, the Secretariat poses direct questions to the independent experts hired by the Secretariat to seek their opinion regarding the enforcement practices, policies and legislation for either the Federal government or the government of Ontario. Article 15(4) authorizes the Secretariat to consider, in preparing the Factual Record, information developed by independent experts. However, the manner in which expert opinion is used, particularly on pages 82-83 and footnote 414, appears to be an attempt to present highly critical opinions and analysis in a document that should be fact-based.

Due to the Secretariat's reliance on selected third party opinions, the general tone of the document is not well balanced; it appears that the Secretariat is attempting to substantiate the submitter's allegations, as opposed to presenting a fulsome accounting of the facts. For instance, given the specificity and the implied gravity of the submitters' assertions regarding the number of nests that were allegedly destroyed in the year 2001 on 49 FMUs, we note that the following contextual information, which was provided to the Secretariat, does not appear in the factual record:

- In 2001 logging in Ontario occurred on less than 0.5% of land base, therefore, by inference, 99.5% of migratory bird nests remained on the landscape, subject to natural predation and disturbances;
- More than twice the area logged is burned or affected by insect damage in a year: each of these natural disturbances results in the destruction of nests; and

- Natural disturbances alone would deplete more area than is harvested annually if fire suppression were not undertaken in conjunction with harvesting.

3) Documents to be included in Appendix

In order to ensure a complete and comprehensive Factual record, the Appendices should include all relevant Council resolutions. Accordingly, Council Resolution 03-05 should also be included.

In order to facilitate our review of the final Factual Record and increase the timeliness of making a decision on publication, it would be appreciated if the Secretariat could provide Canada with an electronic version of the final Factual Record in “revision mode”.

Canada notes that as a matter of procedure, comments of a Party are not to be made public unless and until Council votes to make the final Factual Record publicly available pursuant to Article 15(7) of the NAAEC.

Yours sincerely,

David McGovern
Assistant Deputy Minister,
International Affairs

c.c.: Ms. Judith Ayres
Mr. José-Mauel Bulós

Comments Draft Factual Record for Submissions SEM-02-001 (Ontario logging) & SEM-04-006 (Ontario logging II)

Specific Comments

Page 1, 2nd paragraph, Executive Summary

The offence under S. 6(a) of the *Migratory Birds Regulations* is broader and should be changed to reflect the entire offence: it is prohibited to disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird.

Page 1, 3rd paragraph, and Page 87, section 5.5

The reference to Article 2 of the NAAEC should be corrected; this paragraph is referring to Article 5. This paragraph provides a paraphrase of a lengthy article in the NAAEC; however, the paraphrasing contains an error. Article 5 of the NAAEC lists examples of ways in which environmental laws can be effectively enforced as alternatives (note “or” in second last sub-paragraph, whereas the Secretariat records them as “and”). Moreover, there are various other examples listed in Article 5 which are not listed. For the sake of accuracy and completeness, the language of Article 5 should be presented in its entirety either in this paragraph or in a footnote.

Furthermore, the Secretariat states that Canada provided no information indicating that any such actions had been taken. To reiterate, Article 5 lists a range of actions which aim to achieve effective enforcement of environmental laws. Canada notes that inspections and monitoring are only two of the enforcement options that are available to the Federal Government, and that it is misleading to focus solely on these two actions. This list includes, among others, actions “seeking assurances of voluntary compliance and compliance agreements”. Compliance promotion activities are also considered an enforcement activity by Environment Canada.

On October 16th, 2003 information regarding Canada’s compliance promotion activities was forwarded to the Secretariat (see comment on Closing Note for more information).

Page 1, 4th paragraph**Fourth sentence**

The wording of the following sentence is inaccurate and misleading: “Federal government scientists are calling on the CWS to establish...” This gives the impression there exists a widespread internal lobby led by federal government scientists. Federal government scientists systematically provide internal advice to CWS, as required. More appropriate wording could be: “Federal government scientists are recommending to management to establish...”

Fifth sentence, Page 107-08, Closing Note

The following statement is inaccurate and misleading: “As regards setting conservation priorities, Canada has not yet decided whether downward population trends for severely declining species that are still relatively widespread and common should be a trigger for conservation action.”

Canada notes that conservation action is achieved through monitoring for the declining species that are abundant and widespread. The draft Factual Record refers to a discussion in a scientific journal and provides a misleading synthesis. The paper discusses, among other questions, how to deal with the particular case of declining populations that are common and widespread in a priority setting context. The question being debated is how to best use such a scheme in support of a strategic management approach to address conservation cases of varying degrees of acuteness and/or urgency. In addition, it must be noted that special conservation actions for identified priority species generally benefit other species.

Sixth sentence, and Page 108, Closing Note

The inaccurate statement regarding threats must be changed: Canada does, in fact, use threats in assessments of the level of conservation concern for the species (see below comments on section 5.4.2 for a more detailed discussion).

Last sentence and Page 108, Closing Note

The following statement used in both the Executive Summary and the Closing Note is only partially true, as the information is incomplete: “the availability of information demonstrating a connection

between logging and a downward trend in migratory bird populations is not determinative of whether or not an enforcement action will be taken.”

There is a fairer statement on p. 91 (section 5.5.1.2) where this quote is cited fully: “Information on downward trends demonstrating a connection between logging and the downward trend would be one of the factors considered in the determination of how to respond to a violation.”

The first quote above should therefore be replaced by the second quote from page 91.

Page 2, 1st paragraph, and Page 108, Closing Note

It is factually inaccurate to state that “CWS did not take any enforcement action in response to the complaint.” To be considered accurate the text must be changed to include the added underlined text, which provides additional background information:

The e-mail alerted CWS to a logging operation scheduled to be carried out in Ontario during the migratory bird nesting season under a contingency forest management plan for the period of July 12 to September 1, 2001. The complaint was reviewed and discussed by the officer in charge of investigations and the Chief of the Enforcement Program but CWS did not take any enforcement action against the company in response to the complaint.

This error must also be addressed in the second paragraph of the Closing Note.

Page 3, 2nd paragraph, and Page 108, last sentence Closing Note

The following is a strong statement for which there is no source identified. The statement appears to be an over-extended interpretation of information contained in comments provided to the CEC Secretariat: “Environment Canada has stated that adequate obligations do not exist under provincial rules to require MNR to protect Environment Canada’s interests in forest management activities in Ontario, including its interest in the conservation and protection of migratory birds.”

The sentence appears to be an inaccurate synthesis of comments provided by Environment Canada to the Ministry of the Environ-

ment, concerning the Declaration Order regarding MNR's Class EA Approval for Forest Management on Crown Lands in Ontario. The actual statement from Environment Canada's letter dated April 11, 2003 is as follows:

"We have generally found that most of our earlier comments have not been fully addressed in the Declaration Order, and that adequate obligations do not exist in the Terms and Conditions (T&Cs) to address our interests. Quite specific T&Cs from the original Class EA Approval have been replaced with ones that are less specific, resulting in removal of much of the requirements for specific commitments, policy development, research, monitoring, and reporting. We are still concerned that this may result in an inability of the Class EA requirements to obligate MNR to protect non-timber values, such as migratory birds and their habitats."

Thus, Canada's comment did not relate to the entire forest management planning process by Ontario, as implicated by the comment "adequate obligations do not exist under provincial rules". This inaccuracy should be addressed in both the Executive Summary and the Closing Note.

Page 4, Footnote 3

The fines and jail terms are incorrect in this footnote and should be corrected with the following underlined information: Section 13 of the MBCA provides that for a summary conviction offence, a person faces a maximum fine of \$300,000 and/or a jail term of up to six months. For indictable offences, the maximum fines are \$1,000,000 and/or a jail term of up to three years. With subsequent offences the maximum fine to which an individual is liable can be doubled.

Page 12, 2nd paragraph, section 3

- a) Environment Canada's records indicate that the complaint was received on July 17th, 2001 as opposed to July 12th, as indicated in the draft Factual Record.
- b) The following sentence does not provide a clear summary regarding the above-mentioned complaint: "...and that wildlife officers determined that it did not warrant further action since the logging operations had ceased some time before and MNR indicated that no other logging was planned".

The Government of Canada's Response provided to the Secretariat on October 16, 2003 includes the following information which is a

more accurate picture of what transpired with regards to that complaint:

“The letter of complaint referred to the fact that the Contingency Forest Management Plan, which encompassed the brief period of July 12 to September 1, 2001, included a number of clear-cuts and claimed that these clear-cuts would destroy the nest of migratory birds during nesting season.

The wildlife officers dealing with the complaint determined that it did not warrant further investigation or inspection after consulting with the Ontario Ministry of Natural Resources (OMNR). Since the reported logging operations had ceased some time before, it would be very difficult to collect potential evidence of nest destruction. The OMNR further indicated that no other logging activities were planned. In the absence of any indication of further activities, the officer assessed, in light of the fact that the breeding season was over for many species, that there was no immediate threat to migratory birds in this area that would warrant further enforcement activities at this point.”

Page 17, 2nd paragraph, section 5.2.1, and page 26, last paragraph

Second sentence

It is inaccurate to state that there are four federal law provisions that protect birds and fish. Rather, it would be correct to state that the MBR “is one of the federal law provisions that prohibit...” This correction should be made on page 17 and page 26.

Third sentence

The statement is inaccurate as it is overly broad, and the words “Some of the” should be added to the beginning of the sentence: “The prohibitions contained in these provisions are drafted in broad language which focuses on effects (e.g. nest destruction, harmful alteration of fish habitat) rather than listing prohibited activities”.

Page 17, Footnote 92

This footnote needs to be revised to reflect the amendments to the MBCA in 2005 from Bill C-15. S. 35(1) of the MBR has been repealed and the prohibition is now in s.5.1 of the Act.

Page 19, last paragraph

In following statement the exceptions that are noted should be clarified: "As regards the taking of nests or eggs, the Convention contained an outright prohibition, subject to certain very limited exceptions." To provide more accurate information it is recommended to replace the underlined text with the following: for scientific or propagating purposes.

Page 21, section 5.2.2.2

The following is inaccurate as it is an overly simplistic characterization and synthesis of two separate issues: "In 1982, with the patriation of the Constitution, existing aboriginal and treaty rights were recognized and affirmed, and in 1990, the Supreme Court of Canada held that the aboriginal right to fish takes precedence over the provisions of the *Fisheries Act.*"

The following is an accurate characterization of these facts:

In 1982, with the patriation of the Constitution, existing aboriginal and treaty rights of the aboriginal peoples of Canada were recognized and affirmed.

In 1990, the Supreme Court of Canada dealt with the aboriginal right to fish under the *Fisheries Act*. The Court held that in order to limit a right to fish, the Government of Canada must establish that the limitation or infringement is justified in the circumstances. This decision also applies to the right to hunt migratory birds.

Page 22, 3rd paragraph, section 5.2.2.3

The following accurately characterizes the changes to the Protocol: The Parksville Protocol deleted Article II of the Convention and replaced it with a new Article II that included the following statement of conservation principles and list of means for giving effect to those principles...

Page 23, 2nd paragraph

The following accurately characterizes the changes to the Protocol:

The Parksville Protocol deleted Article III of the Convention and replaced it with a new Article III of the Convention which referred to

a continuous close season (to last ten years) for certain species, with the following...

Page 25, Footnote 137

The Powerpoint presentation referred to in this note is a schematic document that was supplemented by additional comments. It is not a completely accurate representation of the federal government position on whether or not the Convention – as worded in 1916 – provides authority for Parliament to enact regulations for the protection of migratory bird habitat (beyond prohibiting nest destruction) on lands other than federal lands.

Reliance on a PowerPoint presentation to convey the position of CWS on habitat is overly simplistic and misleading as the PowerPoint presentation was not intended to be a stand alone document, and was accompanied by an oral presentation.

Page 26, 1st paragraph, section 5.2.3.1

The following is not an accurate description of forestry jurisdiction in Canada:

- a) "...the Constitution specifies that provincial legislatures have exclusive legislative jurisdiction to make laws in relation to the "development, conservation and management of forestry resources in the province, including laws in relation to the rate of primary production therefrom."

The sentence should be changed in accordance with the following underlined text: "...the Constitution specifies that provincial legislatures have exclusive legislative jurisdiction to make laws in relation to the "development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom."

- b) "Under the Constitution, the provincial government has sole jurisdiction to authorize and regulate logging on those lands." The sentence should be changed to include the following underlined text: Under the Constitution, the province has exclusive power to authorize and regulate logging on those lands.

Page 26, 2nd paragraph

The following sentence should be corrected by removing the word “such”, and adding the underlined text:

An environmental assessment is required to be carried out under the *Canadian Environmental Assessment Act* (CEAA) before such an authorization can be issued for a project as defined under s. 2 of CEAA.

Page 26, section 5.2.3.1

The following is an *obiter dictum* statement and not a direct ruling as incorrectly stated in the following sentence:

“...Canada ruled that the federal government would be acting “contrary to law” within the meaning of section 18.1(4)(f) of the *Federal Court Act*.”

{According to *Black’s Law Dictionary*, Eighth Edition, this is “a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential”.}

Page 26, Footnote 142

This footnote quotes the following source: Bill C-15, *An Act to amend the Migratory Birds Convention Act, 1994 and the Canadian Environmental Protection Act, 1999*, 1st Sess., 38th Parl., 2004, cl. 8(1) (as passed by the House of Commons 14 December 2004).

The appropriate source to quote is the following: Subsection 12(h.1) of the *Migratory Birds Convention Act, 1994* (as amended June, 2005).

Page 27, 1st paragraph, section 5.2.3.2

Under the MBCA, 1994, a person who contravenes the MBR is liable, on summary conviction, to a maximum fine of \$300,000 and/or a prison term not to exceed six months, and on indictment, a maximum fine of \$1,000,000 and/or imprisonment for up to three years. Repeat offenders can face a doubling of the fine amount.

Page 27, 2nd paragraph

In order to secure a conviction for a violation of s. 6(a) of the MBR, the Crown needs to prove beyond a reasonable doubt that the accused disturbed, destroyed or took a nest* of a migratory bird. It is not necessary for the Crown to prove that the accused intended to do so, only that the accused did do so.

The following footnote should be added after the word nest: "It is also an offence to disturb, destroy or take an egg, nest shelter, eider duck shelter or duck box of a migratory bird."

Page 28, 1st paragraph

The focus of the factual record is whether the government of Canada has failed to effectively enforce its law. The issue of possible defences was not raised by Canada in its response to the Submission or in any of the information provided to the Secretariat as playing a factor in affecting whether and how the government enforces s 6(a) of the MBR. Therefore, aside from consisting of legal opinion, as opposed to fact, the following two paragraphs are extraneous to the purpose and scope of the factual record:

"A defendant must satisfy four conditions...."

Page 28, 2nd paragraph

The following paragraph is inaccurate: "Depending on the circumstance, advice from provincial officials regarding the requirements of a federal statute can provide a basis for a defence of officially induced error...."

The following paragraph should replace the above paragraph: The class of "appropriate official" primarily includes "an authorized representative of the state"¹⁵⁷ and "government officials who are involved in the administration of the law in question."¹⁵⁸ Depending on the circumstances, it may also include provincial officials who provide advice regarding the requirements of a federal statute, "[...] provided that a reasonable person would consider that particular government organ to be responsible for the law in question. The determination relies on common sense rather than constitutional permutations."

Page 53, Footnote 266

The second reference in this footnote (i.e., “See also...”) should be deleted; the relevance of adding the second reference is not clear and should not be included without an explanation.

Page 73, 2nd paragraph, section 5.3.5

Reference to the concept of “no net loss” in the context of fish habitat and wetlands should be more specific:

- An important aspect of the policy for wetlands is that it refers to no net loss of wetland function, not of wetlands as such, or wetland footprint. This is an important distinction to make.
- The underlined provides more accurate language to supplement the existing text in the above-note paragraph: *“One example is the principle of “no net loss,” a guiding principle in federal policy on fish habitat, and no net loss of function, a guiding principle in the federal policy on wetlands. The concept implies that there is a baseline amount of habitat (usually present or historic) and that activities will not be allowed to result in a reduction of that baseline amount, measured in terms of productive capacity or function (this is achieved – depending on the productive capacity of the habitat in question – by not doing the activity, altering the activity, or creating new habitat elsewhere).”*

Page 86, 2nd paragraph, section 5.4.2

The Secretariat quotes an extensive section of Dr. Schmiegelow’s work which includes the following incorrect statement regarding Canada’s consideration of threats to landbirds: “...Canadian ranking system for landbirds is that the scoring system does not include “threats.”

Canada **does** in fact use threats (both on breeding and non-breeding grounds) in assessments of the level of conservation concern for the species. This is discussed in section 5.4.2 but also in the closing note and should be corrected. This statement is also made the executive summary and should be removed.

The following is a brief explanation of the system Canada applies in this regard:

Canada actively participated on the international Partners in Flight (PIF) science committee that developed the scoring system where each species is assigned global scores for 6 factors, assessing largely independent aspects of vulnerability at the range-wide scale: Population Size (PS), Breeding Distribution (BD), Non-breeding Distribution (ND), Threats to Breeding (TB), Threats to Non-breeding (TN), and Population Trend (PT). [...] To determine which species are most vulnerable, global scores were calculated (continental Combined Score (CCS)) for each species.

The PIF system, used in Canada as well as in the other partner countries, combines the highest habitat related threats (highest of TB or TN — threats on the breeding grounds and threats on the non-breeding grounds), with the highest distribution threat (BD and ND: breeding and non-breeding distribution), along with the continental population trend, and the global species population size.

Page 89, 2nd paragraph, section 5.5.1.1

It is noted that “[a] review of the CWS website, both national and Ontario region, revealed no instructions to the public on how to report suspected violations of s. 6(a) of the MBR occurring during logging, or any information on a procedure for linking tips from the public to enforcement of s. 6(a) of the MBR by government authorities.”

Canada notes that this is an overstatement as complaints can easily be made over the Internet. Environment Canada’s GreenLane (www.ec.gc.ca) has a “Contact Us” button for anyone wanting to contact the Department of Environment on any matter, and the Wildlife Enforcement website (http://www.cws-scf.ec.gc.ca/enforce/index_e.cfm) also has a “Contact Us” button for those wanting to contact the Wildlife Enforcement Program directly. The contact information and phone numbers for the regional offices and the National Capital Region can also be found on the website. There is also an Emergency line available 24 hours a day that can be used to establish contact with officers on an emergency basis.

Page 91, 2nd paragraph

The following sentence is only accurate if the words “whether and” are removed: “While the law does not require proof of any particular state of mind in order to establish a violation of s.6(a) of the MBR,

intent is taken into account by enforcement officer in deciding whether and how the law will be enforced.”

Page 91-92, 3rd paragraph

The discussion on “intent” in this section is misleading and inaccurate as there seems to be two different contexts for “intent” used: one is used in the criminal/regulatory context and the other is a descriptor. This discussion attempts to link the need to determine whether there is intent to offend when enforcing the MBR and a definition of a project under the CEAA Inclusion List. As the relevance and objective of the following passage is unclear it should be deleted:

“Under federal policy, another factor to be considered... safe operation of an aircraft.”

Page 96, last sentence, section 5.5.2.3

The following statement is correct but incomplete: “This approach indicates threatened or endangered status as a trigger for conservation measures”. To give the reader an accurate understanding of the approach, it must also be noted that other status conditions will identify populations of conservation concern. Conservation measures include research and monitoring, and may well be implemented for a population for which the status is not as extreme as the threatened or endangered status.

Therefore, for added clarity, this statement should also refer to the fact that not only threatened or endangered status will trigger conservation action.

Page 100, 1st paragraph, section 5.5.2.4

The following contains incorrect information regarding the purpose of the Guidelines:

“...the Environmental Assessment Guidelines for Forest Habitat of Migratory Birds was intended to provide guidance to foresters on incorporating migratory bird considerations into forest management planning for the purpose of achieving certification to the sustainable forest management (SFM) standard of the Canadian Standards Association (CSA) adopted in 1996.”

There are two purposes identified in the guide listed below. Neither purpose involves certification.

The guide should:

- a) First, "...Assist proponents in identifying the types of information and the approach to impact analysis that Environment Canada would expect in an environmental impact statement (EIS) for projects that would affect the forest habitat of migratory birds. As such, it is intended to promote best practices for environmental assessment under the *Canadian Environmental Assessment Act* (CEAA), or when Environment Canada is involved in an environmental assessment of another jurisdiction. It is particularly suited to projects that impact forest habitat of migratory birds at the landscape level".
- b) Second, "...assist forest companies in the development of sustainable forest management plans (FMPs) that provide an ecosystem-based approach to management of forest habitats for migratory birds. The demand for Environment Canada's involvement in FMPs either directly or in evaluating an EIS for an FMP has been increasing. .."

Page 103, 1st paragraph, section 5.5.2.5

The first paragraph states the following: "Though the federal government has not conducted environmental assessments of forestry operations on provincial Crown lands,..."

It would be important to provide the reader with some context regarding the *Canadian Environmental Assessment Act* for an accurate understanding of the Federal Government's actions. The following information should supplement the above paragraph:

A forestry operation on provincial Crown lands does not, in and of itself, trigger an environmental assessment. CEAA applies to projects as defined by the Act, where a federal authority has a specified decision-making responsibility in relation to that project. The decision-making triggers are proposing a project; providing financial assistance for the project; granting an interest in land for the project; or providing a license, permit or approval that is listed in the *Law List Regulations* that enables a project to be carried out.

EC is responsible for conducting the environmental assessment when it has a decision making responsibility that triggers CEAA. In

addition, when a federal EA is triggered, EC as an expert federal authority provides expert advice on migratory birds and other matters under its mandate where required.

Page 104, 1st paragraph, section 5.5.2.5

The following quote: “demonstrate and enhance the stewardship of habitat...” is correct, however, it is incorrectly attributed to the Canadian Wildlife Service 2000-2010 Strategic Plan. The quote is from the CWS Habitat Conservation Program Strategy and not the Strategic Plan itself. The footnote is correct but the paragraph itself is unclear. To provide accuracy to the statement the following sentence is suggested: In addition, a core strategy of the Canadian Wildlife Service 2000-2010 Strategic Plan is “Utilization of the landscape or ecosystem approach”. Under its Habitat Conservation Program Strategy, the Canadian Wildlife Service intends to demonstrate and enhance....”

The last sentence of the same paragraph refers to the Canada-Ontario agreement on EA cooperation, then states that “but only Ontario conducts EAs of forestry operations”... The facts are correct taken individually, but need additional context to be interpreted properly.

- The purpose of the Canada-Ontario agreement is to coordinate the environmental assessment process whenever projects are subject to review by both jurisdictions.
- Since a forestry operation on provincial Crown lands does not, in and itself, trigger an environmental assessment, the agreement is not relevant in this context. It should not be read to imply that the federal government had a responsibility under that agreement to undertake environmental assessments of forestry operations but only Ontario has done so.

This section should not be linked to the last sentence in the paragraph (see comments below). By linking the two it suggests that the reference to “conducting environmental assessments on the impacts of human activities on wildlife habitat” in the Habitat Conservation Program Strategy was a reference to undertaking CEAA assessments. This was not the case.

The sentence which states that “only Ontario conducts EAs related to forestry operations on provincial Crown Lands in Ontario” should either be deleted or placed next to the section that provides

context for federal environmental assessment, as suggested above on Page 103.

Page 107, section 5.5.2.7

The second half of the last sentence in this section should be deleted as the employment location or status of an individual public servant it is irrelevant to the discussion. In addition to the information being inaccurate, the manner in which this information is presented is inflammatory.

Page 107, 2nd paragraph, Closing Note

It is factually inaccurate to state that “the Secretariat received no information from Canada indicating that any such [enforcement] action had been taken”. Canada notes that inspections and monitoring are only two of the enforcement options that are available to the Federal Government, and that it is misleading to focus solely on these two actions. Article 5 of the NAAEC lists a range of actions that aim to achieve effective enforcement of environmental law. This list includes, among others, actions “seeking assurances of voluntary compliance and compliance agreements”. Compliance promotion activities are also considered an enforcement activity by Environment Canada.

On October 16th, 2003, the following information regarding Canada’s compliance promotion activities was forwarded to the Secretariat. This information was part of the Government of Canada’s response to the supplemental information provided by the submitters with respect to SEM-02-001:

“Prior to the filing of the submission, in 2001, CWS and the Forest Products Association of Canada had started working jointly to organize a workshop on migratory bird conservation and forestry which included a discussion of compliance issues. The workshop was held in October 2001. This workshop included CWS biological staff, Environment Canada enforcement staff, planners working in the forest industry, members of the sustainable forestry network, and Canadian Nature Federation (CNF, one of the NGO submitters to SEM-02-001). The workshop covered the current situation pertaining to the MBR, the enforcement approach of Environment Canada, and issues related to the conservation of forest birds. CWS stated its intention to continue to hold additional meetings with other groups that CNF had previously contacted. Outcomes of this workshop

were an affirmation of the significance of the forest environment for the conservation of a large number of migratory bird species and of the difficult compliance issues faced by industry.

Following this workshop, CWS continued its attempt to widen the dialogue by involving a larger spectrum of non-governmental environmental organizations. As described in the initial response to SEM-02-001, a meeting was held on February 5th 2002, at the Sierra Legal Defence Fund office in Toronto. In particular, representatives of the following groups attended: Sierra Legal Defence, CNF, Federation of Ontario Naturalists and Wildlands League. Environment Canada was represented by migratory birds program staff, and enforcement staff. At that meeting, Environment Canada officials understood that the meeting, which they had wanted for some time, had been delayed until after submission SEM-02-001 was filed with the Secretariat. The intended purpose of the meeting was to allow CWS to explain the legal basis of the MBR, the overall approach for the conservation of migratory birds, including enforcement, and the foundations of the current policy on MBR enforcement. By organizing this meeting, CWS sought input from the submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. CWS explained that their approach on regulations and enforcement had two main objectives, first to ensure the sustainability of migratory birds, and second to ensure that their officials, as agents of the Minister of Environment, fulfill their legal responsibilities.

In the fall of 2002, CWS continued the dialogue with the forestry industry and NGOs and started jointly preparing a second workshop to be held in March 2003. This meeting was attended by a similar mix of people from the forest industry, NGOs (including CNF, Ducks Unlimited, World Wildlife Fund) and CWS (including the science, program and enforcement sections). Provincial natural resources departments (Ontario, British Columbia, New-Brunswick and Alberta) also participated in this second workshop. The focus was to discuss conservation and compliance issues with the MBR. The outcome of the workshop was a general agreement by the participants on a draft framework that could deal with migratory bird conservation within the forestry context. The participants also agreed to task a smaller working group to further develop the draft framework. The smaller working group meets monthly and is preparing recommendations for the end of December 2003. It is envisioned that to implement such a system, regulatory changes would be required to allow the department to consider an approval system

to deal with the destruction of nests that may result from industrial operations.”

It is therefore, incorrect to state that “[t]he Secretariat received no information from Canada indicating that any such actions had been taken.”



Forest Management Branch
70 Foster Drive, Suite 400
Sault Ste. Marie, ON P6A 6V5

Ministry of
Natural Resources

Ministère des
Richesses naturelles

May 1, 2006

Ms. Rose-Marie Petersen
Policy Advisor
International Affairs, Americas Branch
Environment Canada
10 Wellington Street, 4th Floor (469)
Gatineau, Quebec K1A 0H3

Dear Ms. Petersen:

Subject: Draft Factual Record for Ontario Logging II

Thank you for the opportunity to provide Environment Canada with our comments regarding the content of the Draft Factual Record for Submissions SEM-02-001 (Ontario Logging) & SEM-04-006 (Ontario Logging II).

MNR has cooperated fully with the Commission for Environmental Cooperation (CEC) Secretariat in order to assist Environment Canada (EC) with information requests by the CEC during the preparation of the draft factual record.

Attached to this letter is a table containing our detailed comments of the draft document. We have categorized our comments as to the factual inaccuracies, tone/impartiality and appropriate scope of the relevant submission, regarding the content of the document. We understand that the CEC Secretariat must address the factual inaccuracies of the record. It is also our understanding that comments on the tone/impartiality and appropriate scope of the document, which are not addressed in the final factual record, may be appended to the document when it is publicly posted. We encourage EC to highlight this request in their response to the CEC Secretariat.

It is also our understanding that the factual record is meant to be an objective account of the facts pertaining to the assertions in the relevant submission and is not legally binding.

The following are some general comments about the draft Factual Record. While in our opinion the draft Factual Record goes beyond the scope of the original complaint, we have to assume that the CEC Secretariat will continue to include the information in the record and it will be submitted to the CEC. It is within this context our comments are made.

The draft factual record does not appear to be a well balanced representation of the facts relevant to the submission. The document appears, more so, to reflect the opinions of the authors on natural resource management in Ontario.

Although this factual record contains significant detail regarding forest management planning and land use planning in Ontario, this material is extraneous to the original assertions in the submission asserting the federal government's failure to enforce the Migratory Birds Convention Act on logging activities in Ontario.

It is interesting to note that in a similar submission on logging and migratory birds, made in the United States (SEM-99-002), the North American Council limited the scope of the factual record directly to the assertions made in the relevant submission. The limitation of the scope of the factual record does not appear to be as strict in the case of this submission.

We also note that given the unsupported assumptions made by the submitters in arriving at the number of nests allegedly destroyed, MNR provided information to the CEC Secretariat that logging in Ontario in the calendar year 2001 occurred on 0.5 % of the land base (even less during the nesting season), so by inference, 99.5 % of migratory bird nests remained on the landscape, subject to natural predation and disturbances, such as fire and wind.

The assertions in the submission pertain to the calendar year 2001, however, many documents and discussions referenced are not relevant to the timeframe in which forest management plans that were implemented in 2001, were being prepared and approved.

Since 2001, the Class Environmental Assessment on Timber Management has been replaced by the Declaration Order regarding

MNR's Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (MNR-71), June 2003.

As a result, MNR prepared a new Forest Management Planning Manual that reflects the conditions of MNR-71. Additional conditions of MNR-71 address guide development, incorporating new science, review and effectiveness monitoring. Much of the information (some of which is incorrect or used out of context) no longer applies to how forests are managed in Ontario.

MNR is committed to sustainable development, ecological sustainability, and the conservation of biological diversity. MNR's role in contributing to sustainable development continues to evolve as new knowledge and science becomes available.

We look forward to reviewing the final comments on the factual record which you will be forwarding to the CEC Secretariat.

If you have any further questions on this matter, please contact Dan Pyke, Manager, Forest Management Planning Section, at (705) 945-6708 or e-mail dan.pyke@mnr.gov.on.ca.

Sincerely,

"Rich Greenwood"

Rich Greenwood, R.P.F.
Director
Forest Management Branch

c.c.: Daniel W. Pyke, Manager, Forest Management Planning Section
Brian Hillier, Manager, Forest Policy Section
Dana Kinsman, Resource Management Planning Specialist,
FMPS
Katia Opalka, Legal Officer, Commission for Environmental
Cooperation
Geoffrey Carver, Director, Submission for Environmental
Cooperation of North America, Commission for Environmental
Cooperation

DRAFT FACTUAL RECORD FOR SUBMISSIONS ON ONTARIO LOGGING – MARCH 31, 2006

Section of Record	Page #	Comment Type*	Comment/Suggestions
LEGEND			*Comment Type: FI - factual inaccuracy; ES - exceeds scope; T/I - tone/impartiality
		FI; ES; T/I	Much of this executive summary is factually incorrect and misleading, since it is based on the inaccuracies found in the body of the factual record, as described in the following points:
General	29-78	ES; T/I	There are many relevant components of the forest management planning process that have been excluded from this factual record.
General		T/I; ES	The draft factual record is not a balanced account, MNR responded to the submission about nest destruction, the draft factual record goes above and beyond the assertions made in the submission, some sections have been taken out of context, the general tone is biased
General		ES	The original submission addresses activities that occurred in 2001, many documents, discussions and quotes that are referenced occurred well after 2001.
Executive Summary	3	FI	The text explains the bounds of natural variation and also discusses the loss of habitat for indicator species but does not discuss habitat within the context of the bounds of natural variation, as it is employed in forest management planning in Ontario.
Executive Summary	3	ES	PFTC membership is based on technical expertise, not necessarily group affiliation. However, there is currently a wildlife expert employed by the Canadian Forestry Service on PFTC.
Summary of the Submission	7	FI	There are a lot of assumptions made before arriving at the figure of 43,000 nests being destroyed in the forty-nine FMUs. In addition, no context is provided for the value of 43,700. What kind of confidence surrounds that estimation? How many nests are estimated to be in the area represented by 49 FMUs. The factual record includes the statement 'They maintain that statistical or modeling information is appropriate where it is the best information that is reasonably available to a citizen's group'. It may be argued that considering the depth and breadth of the Draft Factual Record, the estimate of the nest destruction could be and should be accom-

Section of Record	Page #	Comment Type*	Comment/Suggestions
Summary of the Submission (cont.)	7	FI	panied by more scientific rigour. It is hard to figure out how the estimated number of nests only decreased by less than half even though the submitters estimated that on average only 5.3% of the annual harvest occurred during nesting, although on p. 11 Canada does assert that the estimate of nest destroyed is very imprecise
5.1	15	FI	"The Secretariat did not receive a reply from MNR." This was an oversight by MNR, and the letter, written Nov. 16, 2005 was forwarded to the CEC Secretariat April 19, 2006.
5.1	15	FI	The last paragraph states that at the June 28, 2005 meeting MNR representatives were only from the Forest Policy Sections, however there were also members of Forest Management Planning Section and Forest Evaluation and Standards Section present
5.2.3.2 and 5.2.3.3	27-29	ES	The submission is not whether s. 6(a) was violated or whether logging could be defended, should such a violation have occurred. The submission is purely that the federal government did not enforce s. 6(a) (see section 4, Scope of the Factual Record, page 13)
5.3	29	ES	2nd paragraph indicates the secretariat gathered information on forest management in Ontario since "[this] information is relevant to considering the contribution of this system toward helping companies meet their responsibilities toward the federal MBCA, and in particular, their obligation to comply with s. 6(a) of the MBR." However, Ontario's forest management system and the companies' compliance with s. 6(a) is not the subject of the submission. There is no relationship or relevance provided between the collection of this information and the actual submission.
5.3	34	T/I; ES	Section 5.3 is inflammatory and obvious in its bias to centering out the deficiencies of Ontario's forest management system relative to the protection of migratory birds. It centres on how the system is flawed yet there is no hard evidence as to the destruction of migratory bird nests. While the contents of Section 5.3 may be factual there is no relevance to the submitter's claim against the federal government.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.3	34	FI	Sustainable Forest Licensees are responsible for preparation of forest management plans. FMPs may be prepared by staff or in some cases through consultants.
5.3.1	37	ES	Footnote 200: reference to Beyond 2000 is irrelevant since it did not apply to the forest management plans in effect during the time period identified in the submission (i.e. Jan. - Dec. 2001); these forest management plans would have been prepared prior to the publication of Beyond 2000. This fact is omitted from the record.
5.3.2	37	ES	This section is titled "Setting Objectives Through Planning"; there is no relationship or relevance provided between this section and the actual submission.
5.3.2	38	ES	Much of the material presented is extraneous to the allegation that Canada is failing to effectively enforce s. 6(a) of the Migratory Birds Regulations in regard to the logging industry in Ontario. Documentation of all the examples would be lengthy and perhaps is best captured with a general statement something like " Although this factual record contains significant detail regarding forest management planning and land use planning, this material is extraneous to the original allegation regarding the destruction of nests." For example, from page 38: "whereunder the land base is divided into resource management units dotted with islands of protected areas - be abandoned in favour of a reverse matrix approach that considers..." and further on the same page "A related approach, the triad approach suggests dividing the land base into three types...." This discussion on approaches to ecological planning dilute the intent of the factual record, it becomes unclear whether the issue is one of nests being destroyed, or of forest management in Ontario.
5.3.2.1	44	ES	References in footnotes #224 - 228 are not relevant to the submission, none of these documents existed when FMPs implemented in 2001 were prepared and approved.
5.3.2.2	44	ES	This section is titled "Planning for wildlife values outside the forest management system"; there is no relationship or relevance provided between this section and the actual submission.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.3.2	48	ES; T/I	1st full paragraph: The Conservation Council of Ontario, has no status or responsibilities with respect to managing natural resources. Their opinion (not fact) is not relevant to this factual record.
5.3.3	48	FI; T/I; ES	1st paragraph of the section states "Ontario's system for forest management...where and when trees will be logged, and what, if any, actions will be taken to regenerate the forest." the implication of the statement is that regeneration does not always take place. Under the CFSA and the FMPM (regulated under the CFSA) SFL holders are obligated to the renewal and maintenance of the forest as per their approved forest management plan.
5.3.3	48	FI	The 1st paragraph of Sect. 5.3.3 states that "Non-timber objectives are expected to be adopted through processes outside and above forest management planning" however, there are objectives for habitat in forest management plans.
	48	FI	The 1st paragraph of Sect. 5.3.3 states that "Wildlife habitat... is used as a "proxy indicator" ... for wildlife population status." Forest management plans deal with the management of forest cover and do not use habitat as a "proxy indicator" for wildlife population status.
5.3.3.2	50	FI	The last paragraph states that the "The 1996 Forest Management Planning Manual does not define what the "desired future forest condition is..." when in fact the desired future forest condition is explained in the FMPM as "The predicted future forest condition of the selected management alternative..."
5.3.3.2.1	52	ES	This section is titled "Wildlife as an indicator of sustainable forest management"; there is no relationship or relevance provided between this section and the actual submission.
5.3.3.2.1	52	ES; T/I	References in footnotes #260 and 263 are not relevant to the submission, none of these documents existed when FMPs implemented in 2001 were prepared and approved.
5.3.3.2.1	53	FI	footnote 265 references a 2002 document; given that the submission is relevant to logging in Ontario in 2001, this document is not relevant, and the reference is incorrect since the document is in DRAFT form (see also footnote #329 comment p. 70)

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.3.3.2.2	54	ES	This section is titled "Tracking Wildlife Habitat"; there is no relationship or relevance provided between this section and the actual submission.
5.3.3.2.3	58	FI	In previous text the bounds of natural variation is explained; Table 1 does not explain the increase or decrease of habitat projections in the context of BNV
5.3.4	60	ES	The sections titled "Dealing with Uncertainty" and "Adaptive Management" have no relationship or relevance to the actual submission.
5.3.4.1	62	FI; T/I	1st full paragraph: I don't believe the Provincial Forest Technical Committee or the Provincial Forest Policy Committee (underlining added to emphasize the correct names of these committees) were created "to institutionalize adaptive management within MNR". This appears to be an opinion of the author of this report, and not a statement of fact.
5.3.4.1	63	FI; T/I	footnote 297: The minutes referenced in the footnote are from 2000; the cutbacks referred to in the corresponding text occurred in 1996; one would not expect to see a reference to them in meetings four years after the fact. This important relationship is omitted from the factual record.
5.3.4.1	64	FI; T/I	text at top of page: the use of the funds in the Fish and Wildlife Conservation Act special purpose account does not fall under the mandate of either the Prov. Forest Policy Committee or the Prov. Forest Technical Committee, so it is not surprising that this fund was not discussed by either of these committees. The implication to the reader, however, is that the committee was somehow negligent.
5.3.4.1	65	FI; T/I	footnote 305 concludes that, in David Euler's opinion, the "model of science into guides" referenced in a Summary of Discussion for the Prov. Forest Technical Committee (PFTC) does not exist. This is obviously Dr. Euler's opinion, and not a fact, even though Dr. Euler is a member of this committee and was present at the meeting that is cited. The model referred to was proposed by a member of the PFTC and does, indeed, exist. The "model" was not a computer model but a flow chart which suggested a pathway for incorporating new science into guides. Its existence was credited at all PFTC meetings where it was discussed.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.3.4.1	64-65	ES; T/I	footnote 301 and corresponding text refers to the revision of a forest management guide in 2004 and 2005. This is not relevant to forest operations that occurred between Jan. and Dec. 2001
5.3.4.1	66	ES	The first paragraph refers to "Implementing adaptive management..."; the supporting footnote #310 however, is not describing adaptive management, but analysis runs for each of the management alternatives.
5.3.4.2	66	FI; T/I	1st paragraph, 2nd sentence should read "... some FMUs contain landscapes ..." (underlining added to note missing word); the situation described in this sentence does not occur throughout the province, as is implied by the current wording.
5.3.4.2	67	FI; T/I	Footnote 320 references a forest management plan approved in 1999 (written between 1996 and 1999) as an example of the implementation of a forest management guide that was not published until 2001. This is factually incorrect, makes no sense and is misleading.
5.3.4.2	67	ES; T/I	the references to "normalized" forest and unfairly prioritizing species conservation over timber supply are a reference to only one plan from 1 of 53 FMUs.
5.3.4.2	69	FI; ES; T/I	sentence at top of page should read, "Should fish habitat be affected, logging in riparian areas can trigger ..." (underlining added to note missing phrase). The supposition (not fact) of the existing words is that logging in riparian areas affects fish habitat. The relationship of this sentence to the preceding paragraph (and the scope of this factual record) is unclear.
5.3.4.2	70	ES; T/I	footnote 329 and other references to this document throughout the report (e.g. footnotes 265, 343); Messages used in 2002 to train planning teams developing 2004 forest management plans are irrelevant to forest operations that occurred between Jan. and Dec. 2001.
5.3.4.2.1	71	T/I; ES	Figure 6 is not explained in the text, the graph is difficult to read, and is not explained within the context of BNV. The figure in fact shows that the habitat for sparrow increases from current levels with every Management Alternative presented. This is not a decline in habitat as the text suggests.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.3.4.2.1	71	FI	In the 1st paragraph the text refers to "current MNR direction on emulating natural disturbance scenarios allows forest management planners to select ...for the reduction of the amount of preferred habitat"; although the text does explain BNV, this text does not put management alternatives with respect to wildlife habitat in the context of the BNV.
5.3.5	71	ES	The section is titled "Population Objectives for Wildlife"; there is no relationship or relevance provided between this section and the actual submission. Forest management plans in Ontario do not set population objectives for wildlife.
5.3.4.2	72	FI	1st full paragraph: the forest management guide review conducted in 2000 was not mandated by the Timber Class EA, as stated in the factual record.
5.3.4.2	73	FI; T/I	Footnote 335: The Wildlands League website should not be used as a source of fact since they have no responsibility for resource management in Ontario. The same information is available on the MNR website, the group with the legal mandate to review and revise the forest management guides.
5.3.4.2	73	FI; ES; T/I	1st full paragraph, 2nd sentence: states that "[f]here has been an expectation that the review ... will free-up wood supply ...", but the factual record does not state what group holds that expectation. The implication is MNR, but, in fact, this is not true. See also comment for footnote 336.
5.3.4.2	73	FI; T/I	Footnote 336: The quote selected from the PFTC Summary of Discussion (June 15, 2000) is taken out of context. It implies that the "increased effectiveness and efficiencies" will take the form of increased wood supply, when in fact this is not the case. Two sentences previous to the one that has been selected, the Summary of Discussion states "An increase in wood supply ... has not been accounted for, or assured at this stage in the review process." MNR's expectation, even at this early stage in the guide review project, was that increased efficiencies would be found in the time required to develop and implement forest management plans, not in increased wood supply.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.3.5	75	FI	Footnote 343 references a 2002 document; given that the submission refers to logging in Ontario in 2001, this document is not relevant, and the reference is incorrect since the document is in DRAFT form
5.3.5	77	FI	The reference to "a value (such as migratory/bird habitat) is not entered into the model as a constraint", is misleading; constraints on forest units (which translate to habitat units) may be placed in the model when habitat for selected wildlife species falls out of the BNV to ensure that does not occur.
5.4	78	ES	The submitters alleged that the federal government failed to enforce s. 6(a) of the MBR, not that the forest industry failed to protect the nests of migratory birds. Like much of section 5.3, this section is irrelevant and outside the scope of this factual record.
5.4.1	79	T/I	The document states that "the FWCA, nests of birds covered under the MBCA are no longer protected under Ontario legislation." This is a misleading statement, given that the province is bound by the MBCA which protects migratory birds; having them covered under provincial legislation would be redundant. The FWCA does in fact protect raptors and other bird species ("wild by nature") which are not protected under the MBCA.
5.4.2	81	ES; T/I	Footnote 369: The Forest Information Manual cited in this footnote was published after the development and approval of the forest management plans that governed activities between Jan. and Dec. 2001, the time period of this factual record. The reference to this manual is misleading and irrelevant to the submission.
5.4.2	81	T/I; ES	In the first paragraph of this section the text states that values that are not known are not mapped. This is true and obvious, it is difficult to map something (i.e. a bird nest) that is not known.
5.4.2	82	FI	In the first full paragraph the reference says that "area of concern planning is not done for species other than raptor nests" (pers. Comm. Dave Euler); this is not true as AOC planning also exists for great blue herons, moose, and many other species and can be created for any other known nests and specific values of any species.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.4.2	82	FI; T/I; ES	Footnote #375, a reference to the Forest Management Plan for the Brights and Forest, is taken out of context; SFMM is not capable of locating canopy trees, it is not designed nor is the data available to identify specific site values for eagle, osprey or herons.
5.4.2	83	T/I; ES	2nd paragraph, a reference to the amount of area in parks and protected areas being insufficient for maintenance of migratory bird populations... they do not take into account the information provided about the percentage of the area of the undertaking which is logged in any given year, not a balanced representation of the facts.
5.4.2	84-87	FI	There is incongruity in referrals made to Table FMP-5. On pages 84-85, there is discussion of Dr. Euler's analysis of Table FMP-5 under 38 Ontario forest management plans. Dr. Schmiegelow pointed out that projected habitat loss under those plans was consistent with estimated habitat loss of the same species resulting from past logging activities in Ontario. Then, on page 87, it is stated that 'These sorts of habitat suitability indices were very popular in the 1980's and early 90's, but have been extensively criticized and discredited in the ecological literature, and have been challenged as planning tools.' It is incongruous to use a trend in Table-FMP5 as an indicator of habitat decline, and then, a few pages later, to discredit the matrices used for determining the trend.
5.4.2	87	FI; T/I	1st quote, last sentence: it is unclear whether the "development activities" referred to in this quote are forestry, oil and gas exploration, mining, agriculture or some other human activity. The implication is that it refers to forest management, but this may not be true.
5.4.2	87	T/I; ES	1st paragraph "significant declines of 1-3% and >3%/yr... over a ten year period, these translate into ...>30%" this reference appears to be taken out of context since it does not address the fact that forests regenerate.
5.4.2	87	FI	2nd paragraph refers to "habitat matrix model" ... the habitat matrix is not a model, but an input into SFMM.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.5.1.1	89	FI	The last paragraph states that "modelling... is appropriate as a basis for assessing and authorizing logging activities involving migratory bird nest destruction..." This statement is incorrect. Modelling is not used to authorize logging. Logging activities are not planned to destroy migratory bird nests.
5.5.1.1	89	FI	footnotes 403 and 404: cites pers. comm. with the Manager of the Forest Policy Section or the Manager of Forest Management Planning Section, both were at the meeting but only FPS is noted.
5.5.1.1	89-90	ES	last paragraph: The description of Ontario's Environmental Bill of Rights and the reports of the Environmental Commissioner are completely irrelevant to the CEC, the NAAEC or this submission.
5.5.1.2	91	T/I	Footnote 415: the statement "boreal bird populations and timber harvesting should be able to coexist" is buried in a footnote. Another study with a similar finding (Peter Blancher, "Importance of Canada's Boreal Forest to Landbirds" Commissioned by the Canadian Boreal Initiative and the Boreal Songbird Initiative, May, 2003) is not cited in this factual record.
5.5.1.2	92-93	FI; ES; T/I	Last paragraph: The memo from the Forest Products Association of Canada is irrelevant to the submission and the factual record. It indicates the opinion of an employee of the association, and does not present a fact.
5.5.2.2	94	ES; T/I	1st paragraph: The draft strategy described in this paragraph is dated 2003 and is unrelated to forest management activities that occurred between Jan. and Dec. 2001, the timeframe of this factual record.
5.5.2.2	95	ES; T/I	2nd full paragraph: The plan described in this paragraph is dated 2004 and is unrelated to forest management activities that occurred between Jan. and Dec. 2001, the timeframe of this factual record.

Section of Record	Page #	Comment Type*	Comment/Suggestions
5.5.2.2	95	ES; T/I	last paragraph: The presentation described in this paragraph occurred in 2005 and is unrelated to forest management activities that occurred between Jan. and Dec. 2001, the timeframe of this factual record.
5.5.2.3	99	ES; T/I	Last two paragraphs: The topics of these paragraphs occurred in 2004-2005 and 2003, respectively, and are unrelated to forest management activities that occurred between Jan. and Dec. 2001, the timeframe of this factual record.
5.5.2.4	101	T/I; ES; FI	2nd paragraph "FMP in Ontario is not carried out with a view to complying with prohibitions on bird nest destruction contained in the MBR and Ontario's FWCA". This statement is a conclusion and a judgement, and not factual.
5.5.2.4	103	FI	1st partial paragraph and footnote 465: should reference to Forest Policy Section and Forest Management Planning Section since both Managers attended the meeting although only FPS is referenced in footnotes 403 and 404.
5.5.2.5	105	FI	Footnote 474: The Summary of Discussion cited does not support the statement made in the text. The "need for federal involvement in developing provincial forestry guidelines" is not mentioned in the Summary of Discussions.
5.5.2.6	106	FI; T/I	Footnote 482: It should be noted that Ontario MNR staff participated on this federal working group.
5.5.2.7	107	T/I ES	PFTC membership is based on technical expertise, not necessarily group affiliation. However, there is currently a wildlife expert employed by the Canadian Forestry Service on PFTC.
6	108	FI; T/I; ES	1st full paragraph, 5th sentence: This states that a management alternative is "a plan for where and when to log over several decades", this is not an accurate description, a MA is a set of specific management objectives with quantified targets and management strategies which aim to achieve those objectives.

Section of Record	Page #	Comment Type*	Comment/Suggestions
6	108	FI; T/I	1st full paragraph, 2nd last sentence: Declines of bird habitat ranging from 8% to 35% are noted, but never explained fully i.e. 35% below what. The misleading implication is that the 20% figure provided as a lower limit earlier in the paragraph is measured from the same point of origin, and that the 35% decline is below the 20% lower limit. In fact, these two numbers are unrelated and not presented in the context of BNV.
Closing Note	108	FI	2nd paragraph "Ontario's forest management guidelines require protection of known raptor nests during logging" the implication is that MNR does not have guides to protect other nests (i.e. great blue herons) or other values, which would incorporate other species specific values and habitat etc. This is not true, we have many other guidelines for such values.
Closing Note	108	T/I; FI	2nd paragraph referring to decline in bird species habitat...this does not consider the context of BNV.

ATTACHMENT 3

Comments of United States





Mr. William Kennedy
Executive Director
Secretariat of the Commission for Environmental Cooperation
393, rue St-Jacques west, bureau 200
Montreal QC H2T 1N9

Re: Ontario Logging Draft Factual Record

Dear Mr. Kennedy,

Thank you for providing the United States with a copy of the draft factual record for Submissions SEM-02-001 (Ontario Logging) and SEM-04-006 (Ontario Logging II). The United States strongly supports the public submissions process provided for under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) and welcomes the opportunity to review and comment on this draft factual record.

Although the term “factual record” is not defined in the NAAEC nor the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (“Guidelines”), both of these sources provide guidance regarding the purpose of the factual record and the type of information it should include. A factual record should provide the public with an impartial presentation of the relevant facts but should not contain conclusions as to whether a Party is, in fact, effectively enforcing its environmental law. A factual record should provide the public with the information they need to draw their own conclusions regarding the effectiveness of the enforcement by a Party of its environmental law. It is with this backdrop that the United States provides its comments to the Secretariat on the Ontario Logging and Ontario Logging II draft factual record attached hereto.

The United States recognizes the substantial effort it took to prepare the Ontario Logging and Ontario Logging II draft factual record and greatly appreciates the Secretariat’s effort in this regard.

Should you have any questions regarding the United States' comments, please do not hesitate to contact Nadtya Ruiz (202-564-1391) or David Gravalles (202-564-5483).

Sincerely,

Judith E. Ayres
Assistant Administrator

Attachment

1. The United States generally supports the comments of the Government of Canada that are set forth in Canada's comment transmittal letter. The United States emphasizes its support of Canada's comments concerning the extent to which the factual record focuses on numerous matters, such as Ontario's regulation of the logging industry, that do not appear to pertain directly to the alleged failure of Canada to effectively enforce section 6(a) of the Migratory Birds Convention Act. The United States also emphasizes its support of the views stated by Canada regarding the importance of maintaining objectivity in the factual record, and Canada's comments concerning the manner in which the factual record uses expert opinion and selectively presents the views of stakeholder advocacy groups. Finally, the United States highlights its continuing concern that the preparation of factual records hew precisely to the terms of the Council resolution authorizing such preparation, and that the Secretariat avoid drawing legal opinions and conclusions in the factual record.
2. The summary of Canada's Response to the Submission (Section 3) occasionally refers to matters that Canada "claims." The United States urges that the factual record be more consistent in using neutral language, such as "states" or "asserts," to describe Canada's positions. This would help foster a tone of objectivity, and would be especially appropriate because Canada is not making allegations as a Submitter but instead is responding to such allegations as a Party.
3. The mistaken reference to Article 2 instead of Article 5 in the Executive Summary, page 1, should be corrected. Consistent with its view, reiterated above, that factual records should not offer legal conclusions or opinions, the United States also urges that this reference simply quote the relevant NAAEC provisions, rather than attempt to characterize their content legally.
4. The Secretariat's summary of the Submitters' positions should similarly avoid characterizations that offer or appear to offer legal opinions or conclusions by the Secretariat. For example, the final full sentence on p. 7 of the draft factual record, which begins "They note that the object of the NAAEC citizen submissions process is . . .," should be revised to read "They urge that the object of the NAAEC citizen submissions process is . . ." Similarly, the immediately following sentence, which appears on pp. 7-8, should be changed so that it reads "They contend that there is little merit in investigating specific instances when they allege that all of the evidence . . .," rather than

“They contend that there is little merit in investigating specific instances when all of the evidence”

5. As was the case with past factual records, this draft factual record should not be finalized without a disclaimer that the document has been prepared by the Secretariat, and that the views contained therein do not necessarily reflect the views of the governments of Canada, Mexico or the United States of America.
6. In order to facilitate the United States’ review of the final Factual Record and increase the timeliness of a decision with respect to publication, the United States requests that the Secretariat provide it with an electronic version of the final Factual Record in “revision mode.” In addition, the United States notes that, as a matter of procedure, its comments are not to be made public unless and until their publication is authorized consistent with the NAAEC.
7. The United States notes that its general support of Canada’s comments does not necessarily constitute agreement by the United States with each and every legal interpretation offered by Canada in those comments.

